

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Qwest Communications)	WC Docket No. 03-11
International Inc.)	
)	
Consolidated Application for Authority)	
to Provide In-Region, InterLATA Services in)	
New Mexico, Oregon and South Dakota))	
To: The Commission		

**REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.
IN SUPPORT OF CONSOLIDATED APPLICATION
FOR AUTHORITY TO PROVIDE IN-REGION, INTERLATA SERVICES IN
NEW MEXICO, OREGON AND SOUTH DAKOTA**

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Pursuant to the Commission's *Public Notice*, DA 03-125 (January 15, 2003),

Qwest Communications International Inc. ("Qwest") hereby submits its Reply Comments in the captioned proceeding.

I. INTRODUCTION AND SUMMARY: GRANT OF QWEST'S APPLICATION IS SUPPORTED BY THE RECORD AND COMMISSION PRECEDENT

The comments filed in this docket provide further support for grant of Qwest's application for authority to provide interexchange service in New Mexico, Oregon and South Dakota. They underscore that the time has come for residents of those states to begin to enjoy the competitive choices recently extended to consumers in nine other states in the Qwest region.

Specifically, the New Mexico Public Regulation Commission ("NMPRC"), the Public Utility Commission of Oregon ("OPUC") and the South Dakota Public Utilities

Commission (“SDPUC”) have recommended that Qwest’s application be approved. ^{1/} They point to the large record amassed in their own Section 271 proceedings demonstrating that Qwest has satisfied all elements of the competitive checklist in their respective states. They point to significant local exchange competition in their markets. And they agree that grant of interLATA authority to Qwest would serve the public interest and advance the pro-competitive objectives of the Act.

Similarly, the Department of Justice “recommends that the Commission approve Qwest’s application for long distance authority in [the application] states,” subject to the Commission’s independent evaluation. DOJ Evaluation at 2, 11-12. The Department correctly observes that local exchange markets are open in the application states. The Department notes that the OSS systems used in these states “are the same as those reviewed and approved by the Commission in the [*Qwest 271 Order*], and the performance data submitted in support of this application appear generally consistent with those submitted in support of [the Qwest III] application.” *Id.* at 2.

^{1/} See Comments of the NMPRC at 5, 64 (recommending that this Commission “approve Qwest’s application for authority to enter the in-region, interLATA market in the State of New Mexico”); Comments of the OPUC at 17 (recommending that this Commission “approve Qwest’s application to offer in-region interLATA service in the state of Oregon”); Comments of the SDPUC at 16 (concluding that Qwest has satisfied the requirements of the competitive checklist and of Track A).

As discussed below (at Section II), the NMPRC elected not to render a dispositive recommendation regarding Qwest’s compliance or non-compliance with Track A in view of perceived “significant issues of first impression.” The NMPRC instead referred the issue to this Commission. See NMPRC Comments at 30. Also as discussed below (at Section VI.B.), the SDPUC initially declined to accept certain features of Qwest’s proposed South Dakota Performance Assurance Plan (the “QPAP”), see SDPUC Comments at 8-16, but subsequently accepted a revised QPAP and recommended that the FCC approve Qwest’s application.

A few competitors nonetheless attempt to distract attention from Qwest's excellent Section 271 record by renewing arguments that have been considered, and rejected, before. These parties disregard findings by the FCC itself in the *Qwest 271 Order*, and by the State Authorities in the course of their Section 271 proceedings. But as shown below, these commenters' objections fail to overcome Qwest's showing of Section 271 compliance, or to establish any basis under the Act or Commission precedent for denial of Qwest's application.

In these Reply Comments, Qwest addresses the principal issues raised by opponents of its application. First, Qwest responds to allegations that it has not satisfied the requirements of Section 271(c)(1) generally, and in New Mexico in particular. Second, Qwest responds to certain commenters' continued criticism of its OSS and CMP – criticism leveled, unsuccessfully, in the Qwest III proceeding against the very same OSS and CMP - as well as issues relating to commercial performance. Finally, Qwest addresses certain additional topics raised by commenters, none of which provides any ground for denial of Qwest's application for interLATA authority.

Qwest's application demonstrates that local markets in New Mexico, Oregon and South Dakota are "irreversibly open to competition," *New York 271 Order*, 15 FCC Rcd at 4164 ¶ 429, and that Qwest has fully satisfied the requirements of Section 271. The Commission should clear the way for consumers in each of the application states to begin enjoying the benefits of more rigorous interexchange competition and the corollary benefits of a more vibrant local exchange marketplace.

Qwest's application should be granted promptly.

II. THE RECORD DEMONSTRATES THAT THE REQUIREMENTS OF SECTION 271(C)(1) HAVE BEEN SATISFIED IN NEW MEXICO, OREGON AND SOUTH DAKOTA

There can be no doubt that Qwest's local exchange markets are fully open in the three application states, just as they are in the nine states where interLATA authority was authorized in the *Qwest 271 Order*. As discussed in detail in Qwest's application, the same policies and procedures apply here, and the same OSS are in effect, as the Commission found satisfactory in its prior order. The openness of these markets is demonstrated by actual competition in each state. This competition fully satisfies the Commission's precedent regarding Section 271(c)(1).

A. Competition in Each of the Application States Fully Satisfies the Commission's Track A Precedent

The Commission has made clear that Track A is satisfied so long as a BOC can show in each state that at least one predominantly facilities-based CLEC is "an actual commercial alternative" to the BOC – which can be done by demonstrating that the CLEC serves "more than a *de minimis* number" of subscribers. 2/

Qwest has demonstrated in its application that it meets this standard in each of the application states. In New Mexico, for example, as of October 31, 2002, Qwest provides 6,163 stand-alone unbundled loops to seven unaffiliated CLECs and 5,197 UNE-Ps to four CLECs.

2/ See *Alabama, Kentucky, Mississippi, North Carolina, and South Carolina 271 Order*, 17 FCC Rcd at 17755-56 ¶ 284 n.1100 (noting Section 271 applications were granted in Connecticut with 0.1% residential competition, in Vermont with 0.28%, Maine with 0.55% and New Jersey with 1.32%); *New Jersey 271 Order*, 17 FCC Rcd at 12281 ¶ 10; *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6257 ¶ 42; *Michigan 271 Order*, 12 FCC Rcd at 20585 ¶ 78. In New Jersey, a CLEC serving no more than 733 residential access lines was deemed to satisfy the *de minimis* standard. See *New Jersey 271 Order*, 17 FCC Rcd at 12281-83 ¶¶ 11-13 n.33 & n.41. A CLEC serving no more than 345 residential lines satisfied the standard in Vermont. *Vermont 271 Order*, 17 FCC Rcd at 7630 ¶ 11; see also *DOJ Vermont Evaluation* at 5 n.19.

See Qwest Br. at 14; Declaration of David L. Teitzel, State of Local Exchange Competition, Track A and Public Interest Requirements (“Teitzel Decl.”), Att. 5, App. A, at 14-15 and Exh. DLT-Track A/PI-NM-1; *see also* Exh. DLT-Track A/PI-NM-3. Further, as of October 31, 2002, Qwest has completed 126 CLEC collocations and is providing 25,510 local interconnection trunks in order for CLECs to access and interconnect with Qwest’s network in New Mexico. See Qwest Br. at 14; Teitzel Decl. at 15. The record demonstrates comparable competition in Oregon and South Dakota. See Qwest Br at 15; Teitzel Decl. at 15-16.

Thus, Qwest fully meets Commission precedent with respect to the requirements of Track A. Sprint nevertheless attempts to argue that CLEC market share in each of the application states is inadequate to qualify under Track A. Sprint Comments at 9-10. But Sprint is simply rehashing the same arguments it previously made – and that the Commission previously rejected – in the context of the Qwest III application. ^{3/} The Commission repeatedly has rejected any suggestion that it should “require [a] particular level of market penetration;” ^{4/}

^{3/} See *Qwest 271 Order* ¶ 32. Sprint also asserts, as it did in the Qwest III proceeding, that “Qwest’s methodology [for estimating CLEC market share] improperly inflates the CLECs’ line estimates by including CLECs’ high speed data lines and local lines which are not used for competitive local service.” Sprint Comments at 10. But, as Qwest demonstrated in the Qwest III proceeding, regardless of how Sprint’s, or any other CLEC’s, customers use their access lines – that is, whether they connect a telephone to them and use them for voice, or connect a modem and use them for IP dial-up service – Qwest is directly competing to provide the same product: a two-way, voice-grade retail access line. The Commission has never suggested that a BOC must adjust its CLEC retail access line data to reflect the type of traffic an end user may be sending over the line at any particular moment, especially since the same access line can be used for both voice and data at different times during the same day.

^{4/} See, e.g., *New Jersey 271 Order*, 17 FCC Rcd 12281-82 ¶¶ 10, 13; *Michigan 271 Order*, 12 FCC Rcd at 20585 ¶ 77; *Qwest 271 Order* ¶¶ 20, 32. The Court of Appeals for the D.C. Circuit has affirmed that the Act “imposes no volume requirements for satisfaction of Track A.” *Sprint v. FCC*, 274 F.3d at 553-54; *see also SBC Communications Inc. v. FCC*, 138 F.3d at 416 (“Track A does not indicate just how much competition a provider must offer in either the business or residential markets before it is deemed a ‘competing’ provider”).

moreover, as the Commission observed in the *Qwest 271 Order*, “Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance.” *Qwest 271 Order* ¶ 32.

In any event, as noted above, the percentage of customers served by CLECs in each of the application states is fully consistent with the penetration rates in other states in which the Commission has granted Section 271 approval. See *Qwest Br.* at 164-65; *Teitzel Decl.* at 50-51. Sprint’s comments should be rejected.

B. Residential Competition in New Mexico Satisfies the Requirements of Track A

Two commenters – AT&T and WorldCom – have challenged Qwest’s showing regarding the extent of residential competition in New Mexico. See *AT&T Comments* at 6-22; *WorldCom Comments* at 1-7. See also *NMPRC Comments* at 19-30 (electing not to render a dispositive recommendation regarding Qwest’s compliance or non-compliance with Track A in view of perceived “significant issues of first impression” regarding the extent of residential competition). Notwithstanding the arguments raised by these commenters, and as explained below, the record demonstrates that Qwest satisfies the Track A requirements in New Mexico. See generally *Teitzel Decl.*; see also *Qwest Br.* at 12-20.

1. Qwest Faces Substantial PCS Residential Competition in New Mexico

Qwest has presented reliable and persuasive evidence that its residential wireline services face substantial competition in New Mexico from Leap Wireless International, Inc., a broadband PCS provider doing business in Albuquerque and Santa Fe as Cricket Communications. See *Teitzel Decl.* at 18-29. Indeed, while the NMPRC chose not to render any recommendation on the Track A issue, it “found it hard to believe that Cricket is serving in excess of 40,000 New Mexicans without a significant number of these customers engaging in

some form of wireline substitution.” NMPRC Comments at 29. This view is consistent with this Commission’s recent recognition, based on market data from Cricket itself, that “about 32 percent of [Cricket’s] customers use their Cricket phones as their only phone, and more than 80 percent use their Cricket phones at home.” 5/

The Commission not only has held that a Section 271 applicant “can rely on the presence of broadband PCS providers to satisfy Track A” but also has provided clear and specific guidance regarding how a BOC may demonstrate the existence of PCS broadband competition. *See Second Louisiana 271 Order*, 13 FCC Rcd at 20621-33 ¶¶ 25-43. In particular, the Commission has stated that “the most persuasive evidence” of competition between PCS and wireline service is evidence of “[a]ctual customer behavior” – that is, “evidence that customers are actually subscribing to PCS in lieu of wireline service at a particular price.” *Id.* at 20624 ¶ 32. The Commission also has indicated several types of evidence that can be used to establish that competitive broadband PCS service is being used to replace wireline service, including studies or other objective analyses identifying customers who have replaced wireline service with broadband PCS service or “would be willing to consider doing so based on price comparisons.” *Id.* at 20623 ¶ 31. The Commission also has stated that “[e]vidence of marketing efforts by broadband PCS providers designed to induce such replacement are also relevant.” *Id.* The evidence presented by Qwest conforms to the Commission’s guidance and establishes that

5/ Seventh Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 17 FCC Rcd 12985, 13018-19 (2002) (footnotes omitted); *see also* Sixth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 16 FCC Rcd 13350, 13382-83 (2001) (“According to Leap, about half of its customers view their phones as replacements for first or second lines. . . .”) (footnotes omitted).

Cricket's service provides an actual commercial alternative to Qwest's local exchange service for more than a *de minimis* number of residential customers. ^{6/} Teitzel Decl. at 20-29.

Qwest's evidence includes a survey conducted by Keith Frederick of FrederickPolls LLC (the "Cricket Survey"). ^{7/} The Cricket Survey clearly establishes that at least 8,410 residential customers in New Mexico have disconnected all residential wireline service and are using Cricket's broadband PCS service as a substitute. Qwest Br. at 17; Teitzel Decl. at 22; *see also* Exh. DLT-Track A/PI-NM-5 (New Mexico PRC – Corrected Direct Testimony of Keith Frederick) and Exh. DLT-Track A/PI-NM-6 (New Mexico PRC – Redacted Rebuttal Testimony of Keith Frederick); *see also* Qwest *ex parte* submission, February 13A, 2003 (tabulated responses to Cricket Survey).

The results of the Cricket Survey are not surprising given that Cricket is aggressively marketing its PCS product to induce wireline service replacement. For example, a recent visit to Cricket's website reveals that the banner for Cricket's latest promotion is "Goodbye, Home Phone. Hello, Hundred Bucks." ^{8/} This is consistent with the other evidence in the record of "wireless-for-wireline" marketing. As another example, Cricket issued a press

^{6/} Given the Commission's decision that broadband PCS service qualifies as facilities-based competition, it follows that the Commission's well-established *de minimis* standard for facilities-based competition also applies to PCS. *See Second Louisiana 271 Order*, 13 FCC Rcd at 20621-33 ¶¶ 25-43.

^{7/} Keith Frederick, president and owner of FrederickPolls LLC, has been involved in conducting surveys for 23 years and has managed over 2,000 telephone interview surveys, including their design and execution. *See* Exh. DLT-Track A/PI-NM-5 (New Mexico PRC – Corrected Direct Testimony of Keith Frederick) at 2.

^{8/} *See* <http://www.cricketcommunications.com/promotion.asp> (viewed February 19, 2003). Cricket's aggressive marketing efforts have paid off: no commenter has disputed the survey finding that Cricket has more than 45,000 customers in New Mexico. *See* Qwest IV, Att. 5, App. K, NM Vol. 1, Tab 1276 at 24-25 (Rebuttal Testimony of Michael Ripperger (NMPRC Staff witness) before NMPRC Hearing Examiner conceding finding is reasonable).

release stating that it provides an “ideal solution for people who choose to go wireless instead of signing up for traditional local phone service.” Teitzel Exh. DLT-Track A/PI-NM-7 (June 24, 2002, Leap Wireless Press Release); *see also* Teitzel Decl. at 24-26. Additionally, Cricket has used television advertisements and direct mailers expressly and successfully to promote its PCS service as an alternative to wireline service. *See* Qwest Br. at 18; Teitzel Decl. at 25-26; *see also* Qwest IV, Att. 5, App. K, NM Vol. 1, Tab 932 at Exh. JWB-1. As early as September 2001, Cricket was running television commercials in New Mexico in which a man declared that he has “no home phone” because “Cricket’s the only phone I need.” *See Id.* at JWB-1, Att. J. Further, as recently as February 20, 2003, Cricket was continuing to air television commercials claiming that “everywhere you look home phones are being *replaced*” by Cricket service that “works just like your home phone with all the local calls you want for one low predictable price plus plenty of free long distance,” and asking viewers “why pay for [both Cricket service and Qwest service]” when Cricket “could be your only phone?” *See* Declaration of Gary L. Noble, Cricket Television Commercial (“Noble Decl.”); Exh. GLN-Cricket-1 (Transcript of Cricket Television Commercial); *see also* http://www.qwest.com/about/policy/ldReentry/files-jan15/multimedia/cricket_spot.mpg (MPEG version of Cricket Television Commercial).

Cricket’s television commercial graphically illustrates the point that Cricket’s PCS service is *replacing* wireline residential service by depicting traditional wired telephones being removed from houses at night by crickets that carry them out into the streets and throw them over a cliff. *Id.*

Notwithstanding the record evidence in the application, AT&T and WorldCom contend that Cricket’s PCS product is not an actual commercial alternative to Qwest’s wireline

residential services. ^{9/} See AT&T Comments at 15-22; WorldCom Comments at 4-6. AT&T purports to find fault with the Cricket Survey, first, because it “focused only on existing Cricket customers.” According to AT&T, the results of the Cricket Survey are “unrepresentative” because they do not provide information regarding whether New Mexican “residential consumers generally view Cricket service . . . as an actual commercial alternative to Qwest’s wireline services.” AT&T Comments at 19.

AT&T’s criticism is misplaced. As the Commission has stated, “[t]he most persuasive evidence concerning competition between PCS and wireline local telephone service is *evidence that customers are actually subscribing to PCS in lieu of wireline service*,” rather than generic surveys of consumer attitudes regarding wireless-for-wireline substitution. *Second Louisiana 271 Order*, 13 FCC Rcd 20624 ¶ 32 (emphasis added). Indeed, AT&T’s argument appears to be based on an incomplete reading of the Commission’s *Second Louisiana 271 Order*, and specifically of the Commission’s findings regarding one of the studies at issue in that order – the “M/A/R/C Study” – which surveyed a total of only 202 self-selected PCS customers who had responded to newspaper advertisements in New Orleans. In marked contrast to the Cricket Survey, the M/A/R/C Study’s conclusions regarding PCS-for-wireline substitution were derived “by extrapolating the results of the M/A/R/C study and applying them to its estimated universe of 35,000 subscribers for all five PCS carriers in the state of Louisiana.” *Id.* at 20627-28 ¶ 36. The Commission criticized the M/A/R/C Study’s methodology specifically because there was no evidence that the self-selected New Orleans respondents were similar to PCS users in other parts

^{9/} As noted above and as discussed in Mr. Teitzel’s declaration, Teitzel Decl. at 8, the NMPRC concluded that consumers’ reliance on Cricket’s PCS product as a substitute for Qwest’s residential wireline service presented “significant issues of first impression” and therefore opted to defer to this Commission on those issues. *NMPRC Final Order* at 66 (¶ 156). See also NMPRC Comments at 30.

of the state. *Id.* at 20628–29 ¶ 37. This criticism clearly does not apply to the Cricket Survey, which involved a randomly selected sample of over 9,000 Cricket customers and extrapolated their usage patterns only to the larger population of *Cricket* customers, rather than to customers of other PCS carriers throughout the state. ^{10/} See Teitzel Decl. at 22-23; *see also* Exh. DLT-Track A/PI-NM-5 (New Mexico PRC – Corrected Direct Testimony of Keith Frederick) and Exh. DLT-Track A/PI-NM-6 (New Mexico PRC – Redacted Rebuttal Testimony of Keith Frederick).

AT&T and WorldCom also allege that the Cricket Survey used questions that were “hypothetical” and that the use of “hypothetical” questions “produced strange results.”

^{10/} To the extent AT&T contends that Cricket’s broadband PCS service is not a commercial alternative to Qwest because it serves only a niche market, its argument is particularly anecdotal and unpersuasive. For example, AT&T twice observes that Cricket offers “small, brightly colored wireless telephones,” which AT&T asserts are attractive to teenagers and college students who purportedly “often” do not subscribe to wireline service. AT&T Comments at 2, 16. Of course “brightly colored” phones are commonplace, and Cricket’s website reveals that it currently is promoting two very “adult” phones – the Nokia 5170 and Nokia 6370 – in New Mexico, <http://cricket.letstalk.com/product/promo.htm?depId=1&pgId=100&brandId=123&cmpId=166&to=2908&setZip=87102> (viewed February 19, 2003)). AT&T has not offered a shred of evidence to support its contention that Cricket serves only a niche youth market. Contrary to this assertion, the Cricket Survey demonstrates that Cricket serves customers of all ages in New Mexico, and that 44 percent of its respondents were thirty years of age or older. See Qwest *ex parte* submission, February 13A, 2003 (tabulated responses to Cricket Survey). In any event, AT&T’s argument is legally irrelevant because nothing in the Track A requirements mandates that a qualifying CLEC compete for residential customers in every (or any particular) demographic group or type of residence. As the Commission has noted, Congress rejected a version of Track A that would have required the competing provider’s service to have the same “scope” as the BOC. See *Michigan 271* Order at 77 n.170. Additionally, AT&T criticizes Qwest’s “failure” to provide evidence of Qwest wireless customers who have cancelled their wireline service. See AT&T Comments at 18. However, this criticism likewise is irrelevant because, unlike Cricket, which has aggressively positioned its PCS product as a direct replacement for traditional wireline telephone service, Qwest does not market its wireless service as a wireline substitute. Moreover, evidence that Qwest wireless customers – or customers of any other PCS carrier – are replacing their wireline service would only serve to strengthen the New Mexico statistics regarding replacement of wireline with PCS. This underscores the conservative nature of the evidence presented in this application.

AT&T Comments at 20-22; WorldCom Comments at 5-6. 11/ Specifically, AT&T and WorldCom contend that the “hypothetical” questions used in the Cricket Survey may have produced “hypothetical” answers regarding wireline replacement. 12/ But the questions used in the Cricket Survey were not “hypothetical.” As Mr. Frederick testified during the New Mexico Section 271 proceedings, “it is accepted practice to describe a pattern of behavior to survey respondents and ask whether it applies to them,” and the Cricket Survey questions were framed in accordance with this accepted practice. *See* Exh. DLT-Track A/PI-NM-6 at 13 (New Mexico PRC – Redacted Rebuttal Testimony of Keith Frederick). 13/ Further, Mr. Frederick testified

11/ Several of AT&T’s other assertions regarding the Cricket Survey are, simply, false. For example, AT&T states that the Cricket Survey employed “agree/disagree” questions, which is not the case. AT&T Comments at 19 (quoting the *NMPRC Order* ¶ 154). Rather, the first part of the survey described a pattern of behavior and then specifically asked respondents if that behavior was applicable to their own, and the second part of the survey asked the question “Do you have wireline local telephone service in your home?” *See* Exh. DLT-Track A/PI-NM-5 (New Mexico PRC – Corrected Direct Testimony of Keith Frederick). AT&T also complains that no “pre-test” of the Cricket Survey was performed. AT&T Comments at 19 (citing the *NMPRC Order* ¶ 149). But the questions included in the Cricket Survey were subject to prior review and comment by several experts at Voter/Consumer Research, the public opinion research firm responsible for conducting the Cricket Survey. *See* Exh. DLT-Track A/PI-NM-6 at 15 (New Mexico PRC – Redacted Rebuttal Testimony of Keith Frederick).

12/ Question 2 of the Cricket Survey asked:

When some people need to start phone service, they might decide to use the Cricket phone instead of having traditional wireline phone service hooked up in their home. Does this apply to you?

Similarly, Question 3 of the Cricket Survey asked:

Some Cricket customers might decide that Cricket service does away with the need to have traditional wireline phone service in their home. As a result, they terminate their wireline phone services from the local phone company. Does this apply to you?

13/ *See also* Qwest *ex parte* submission, February 25A, 2003 (articulating the reasons that the questions in the first phase of the survey were framed as they were, including an attempt to limit respondent terminations by avoiding wording that could be interpreted as a sales or

that, in his 23 years of experience conducting surveys, he has found that survey respondents are “likely to understand” that this form of survey question is “attempting to elicit their actual behavior, not that of a hypothetical customer.” *Id.* The questions in the first phase of the survey utilized precisely this standard industry technique by describing a condition or behavior to a phone respondent and then asking if that condition applied to him. 14/

If anything, the Cricket Survey undercounts the extent to which Cricket customers are taking up the invitation in Cricket’s advertising to say “Goodbye Home Phone.” The survey was structured to be conservative in its measurement of the extent of wireless-for-wireline substitution. For example, Qwest did not count any respondent as part of the 18.5 percent of customers who terminated service in favor of Cricket unless that respondent not only (1) answered “yes” to the initial question, but *also* (2) confirmed that she did not have wireline service when she subsequently was asked the following Commission-recommended question: “Do you have wireline local telephone service in your home?” 15/ Accordingly, *every single one* of the 18.5 percent of Cricket customers surveyed (translating to the approximately 8,410 to

telemarketing call and to avoid any concerns about leading respondents to an affirmative answer).

14/ See Qwest *ex parte* submission, February 25A, 2003. For example, Question Number Three in the survey consists of two statements followed by a question. The first sentence states, “[S]ome Cricket customers might decide that Cricket service does away with the need to have traditional wireline phone service in their home.” That statement is followed by the description of a concrete action, to wit, “[A]s a result, they terminate their wireline phone services from the local phone company.” The respondents then were asked, “Does this apply to you?” Asking respondents “Does this apply to you?” is the same as saying, for example, “Some people might work in an office. Does this apply to you?”

15/ In the *Second Louisiana 271 Order*, the Commission suggested that “a survey should include a question asking whether the respondent subscribes to wireline local exchange service or otherwise verify that the subscriber does not have wireline local exchange service.” *Second Louisiana 271 Order*, 13 FCC Rcd at 20629 ¶ 39.

9,140 customers upon which Mr. Teitzel's declaration relies), answered "yes" to Question 3, regarding whether she had terminated her traditional wireline telephone service as a result of her Cricket service, *and then also answered* "no" more than two months later when asked the concrete confirming question, "Do you have wireline local telephone service in your home?"

AT&T also questions the validity of the Cricket Survey on the basis that some respondents answered "yes" to both Question 2 (which asked whether they decided to use Cricket *instead of having traditional wireline phone service hooked up*) and Question 3 (which asked whether they had *terminated their traditional wireline phone services*). However, the fact that some respondents answered affirmatively to both Question 2 and Question 3 does not, by any stretch of the imagination, support the conclusion that these respondents have not substituted their Cricket PCS service for wireline service. Indeed, AT&T has it backwards: both questions asked respondents whether they are using Cricket's PCS service in lieu of subscribing to wireline service – one question asking if the Cricket service was purchased *instead of hooking up* new wireline service (Question 2) and the other asking if existing wireline service was *terminated* in favor of Cricket service (Question 3). The fact that a number of respondents answered "yes" to both questions indicates, at most, that they may not have made a clear distinction between or among different types of substitution. 16/ No commenter can make a credible argument that a

16/ In fact, the respondents relied upon by Qwest for the 18.5 percent substitution figure represent only a subset of actual wireless-for-wireline "replacement." The 18.5 percent consists only of customers who terminated existing wireline service and does not include customers who never obtain wireline service from the outset and rely exclusively on Cricket. Qwest also loses business to a competitor when a customer foregoes a second wireline because of Cricket, so it is entirely accurate to count that selection of wireless service in place of wireline service as an instance of substitution as well. See Exh. DLT-Track A/PI-NM-5 (New Mexico PRC - Corrected Direct Testimony of Keith Frederick) at 32-33 (text of Cricket Survey Questions 4 and 5). As the witness for the NMPRC Staff confirmed, replacement of wireline with PCS occurs in at least four scenarios: (1) when a customer chooses only Cricket from the outset without ever signing up for wireline service in the home (Cricket Survey Question 2); (2) when a customer terminates

Cricket billpayer who answers “yes” to Question 2 (regarding a decision to use Cricket in lieu of new wireline service), and “yes” to Question 3 (regarding a decision to terminate existing wireline service), and then answers “no” to the follow-up question, “Do you have wireline local telephone service in your home?” has not replaced Qwest wireline service with Cricket service in some fashion. ^{17/} These respondents have chosen Cricket’s PCS service over traditional wireline service, regardless of which type of substitution is taking place. *See* Exh. DLT-Track A/PI-NM-6 at 16 (New Mexico PRC – Redacted Rebuttal Testimony of Keith Frederick).

AT&T next suggests that Cricket service does not serve as an actual commercial alternative to Qwest wireline service because Cricket offers its service in only two New Mexico cities, Albuquerque and Santa Fe. AT&T Comments at 15. But a CLEC need not be competing across the BOC’s entire service territory in the state in order to qualify as a competing provider under Track A. The Commission has declared unequivocally that it “do[es] not read [Track A]

all existing wireline local telephone service in the home because of Cricket (Cricket Survey Question 3); (3) when a customer terminates a second or additional telephone line because of Cricket (Cricket Survey Question 4); and (4) when a customer foregoes adding a second or additional line because of Cricket (Cricket Survey Question 5). *See* Appendix to NMPRC Comments, Transcript of Proceedings, January 23, 2002, Day Two at 204-207.

^{17/} AT&T’s and WorldCom’s claim that the survey results were skewed because respondents may have been confused about the definition of “wireline,” AT&T Comments at 19 (citing the *NMPRC Order* ¶ 149) and WorldCom Comments at 6, also is unpersuasive. Rather, the survey made conservative assumptions - any respondent in the first part of the survey who expressed confusion by asking for a definition of “wireline” was automatically coded as “don’t know,” and, accordingly, was excluded at the outset from the calculation that produced the 8,410 figure relied upon in Mr. Teitzel’s declaration (representing the most conservative number of Cricket customers who have substituted Cricket’s PCS service for Qwest’s wireline service). *See* Qwest IV, Att. 5, App. K, NM Vol. 1, Tab 1265 at 78-80 (Testimony of K. Frederick before NMPRC Hearing Examiner). Further, any respondent who expressed confusion about the term “wireline” in the second portion of the survey was provided a definition. *See* Exh. DLT-Track A/PI-NM-5 (New Mexico PRC – Corrected Direct Testimony of Keith Frederick) at 11-12. Accordingly, every single one of the Cricket customers surveyed who was included in the 18.5 percent substitution figure (*i.e.*, those who answered “yes” to Question 3 and then later confirmed the absence of residential wireline telephone service) did so without equivocation.

to require *any* specified level of geographic penetration by a competing provider.” ^{18/}

Moreover, Albuquerque and Santa Fe both lie entirely within Qwest’s local service area, Exh.

DLT-Track A/PI-NM-5 at 12 (New Mexico PRC – Corrected Direct Testimony of Keith Frederick), and are the two largest cities in New Mexico, together constituting nearly 38 percent of the state’s population. ^{19/}

AT&T also contends that Cricket’s PCS service “simply cannot be considered a legitimate alternative to Qwest wireline service” because it does not have exactly the same attributes as Qwest’s wireline service. AT&T Comments at 16. AT&T cites E-911 service, local number portability, the ability to connect multiple handsets to a single wireline, short-term contracts, and the ability to purchase DSL service as elements of competitive service that are absent from Cricket’s broadband PCS product. *See id.* at 16-18. But the Commission has previously concluded that a PCS provider can qualify as a “competing provider” under Track A precisely because PCS service and traditional wireline service are “functionally equivalent,” notwithstanding that there might be “certain technical and functional differences between PCS and wireline local exchange service.” *Second Louisiana 271 Order*, 13 FCC Rcd 20621-22 ¶ 28. Additionally, the FCC previously has rejected AT&T’s argument and held that a service does not need to offer the same features, scope, technical configuration, or service characteristics in order

^{18/} *Michigan 271 Order*, 12 FCC Rcd 20584 ¶ 76 (emphasis in original). Specifically, the Commission has determined, based on the House Committee Report for Section 271, that a CLEC qualifies as a “competing provider” for Track A as long as it provides service “*somewhere in the State*” – not necessarily throughout the state as a whole. *Id.* (emphasis in the original).

^{19/} As of April 2000, the total population of New Mexico was 1,819,046, while the populations of Bernalillo (in which Albuquerque is located) and Santa Fe counties were 556,678 and 129,292 respectively. U.S. Census Bureau, *State and County QuickFacts* at <http://quickfacts.census.gov>. (last visited Feb. 12, 2003).

to qualify as a “competing provider.” 20/ Moreover, AT&T fails to acknowledge that Cricket’s PCS service has certain advantages over wireline service, such as mobility, which makes Cricket’s broadband PCS service an actual commercial alternative to Qwest’s wireline service.

Finally, AT&T alleges that “the future of the Cricket wireless service . . . is open to question” because Leap Wireless International, Inc., Cricket’s parent company, currently is experiencing financial difficulties and recently was de-listed from NASDAQ. *See* AT&T Comments at 15-16. But the fact is that Cricket currently is serving thousands of customers in New Mexico and, as the Commission made clear in the *Pennsylvania 271 Order*, the financial health and the competitive fortunes of a competitive provider are beyond the control of the local BOC. 21/ Indeed, the Commission does not even require a competitor to be marketing its services or accepting new customers in order to qualify as a competing provider for purposes of Track A. *See New Hampshire/Delaware 271 Order*, 17 FCC Rcd at 18673 ¶ 21; *Arkansas/Missouri 271 Order*, 16 FCC Rcd at 20778-79 ¶ 119.

20/ The FCC has acknowledged that the House of Representatives rejected a version of Track A that would have required the presence of a CLEC capable of offering “service that is comparable in price, *features, and scope*” to that offered by the BOC. *Michigan 271 Order*, 12 FCC Rcd at 20585 ¶ 77 n.170 (quoting H.R. Rep. No. 104-204, at 7 (1995) (emphasis added). “[E]ven though there may not be complete identity in *technical configuration, service characteristics*, or charges for service between broadband PCS and traditional wireline service,” a PCS provider can still qualify as a “competing provider” under Track A because the two services are “functionally equivalent.” *Second Louisiana 271 Order*, 13 FCC Rcd at 20621-22 ¶ 29 (emphasis added).

21/ *See Pennsylvania 271 Order*, 16 FCC Rcd 17487 ¶ 126. Moreover, in the same press release in which Leap Wireless announced its de-listing from NASDAQ, Harvey P. White, Leap Wireless’ Chairman and CEO, reiterated that the de-listing “will not affect [Leap Wireless’] day-to-day operations and does not change [its] strategic focus.” Leap Wireless Press Release, December 11, 2002, “Leap Receives Decision From NASDAQ Listing Qualifications Panel To Delist Its Common Stock,” <http://www.leapwireless.com/press/content/2002/121102.html> (viewed February 19, 2003).

None of the commenters has raised any arguments to rebut the conclusion – based on Qwest’s Commission-guided evidence regarding Cricket’s PCS service in New Mexico – that a greater than *de minimis* number of customers in New Mexico have replaced their residential wireline service with Cricket’s PCS service and that Cricket is an “actual commercial alternative” to Qwest in the residential New Mexico market.

2. Qwest Faces Substantial Resale Residential Competition in New Mexico

Although AT&T contends that “resale lines cannot satisfy Track A,” AT&T Comments at 7-8, 11-13, the Commission has now twice stated expressly that the residential component of Track A may be satisfied through evidence of resale competition if there is facilities-based business competition. *Second Louisiana 271 Order*, 13 FCC Rcd 20635 ¶ 48; *Kansas/Oklahoma 271 Order*, 16 FCC Rcd 6257-58 ¶ 43 n.101. In particular, in the *Second Louisiana 271 Order*, the Commission determined that Track A requires applicants to demonstrate merely that there is facilities-based competition in either the residential or business segments of the market - but not both. *Second Louisiana 271 Order*, 13 FCC Rcd 20633-35 ¶¶ 46-48. If CLECs are serving business customers over their own facilities, the Track A requirements are satisfied even if residential customers are being served entirely *via* resale:

We note . . . that reading the statutory language to require that there must be facilities-based service to both classes of subscribers to meet Track A could produce anomalous results, and there appear to be overriding policy considerations that lead to a contrary construction of the statutory language. In particular, if all other requirements of section 271 have been satisfied, *it does not appear to be consistent with congressional intent to exclude a BOC from the in-region interLATA market solely because the competitors’ service to residential customers is wholly through resale.* 22/

22/ *Id.* ¶ 48 (emphasis added). The Commission noted that “[t]he language of section 271(c)(1)(A) is ambiguous on its face,” since the requirement that there be both business and residential competition appears in a separate sentence from the requirement that CLECs be using

The Commission reaffirmed this conclusion in the Kansas/Oklahoma Section 271 case, in which there was serious dispute regarding whether certain evidence demonstrating the existence of facilities-based competition had properly been submitted to the record. *See Kansas/Oklahoma 271 Order*, 16 FCC Rcd 6257-58 ¶ 43 n.101. Although the Commission decided to consider the disputed evidence of facilities-based competition, it also explained that even if such evidence had been excluded, “[b]ased on the totality of circumstances . . . and based on our conclusions regarding checklist compliance, we likely would not have denied this application on ‘Track A’ grounds, and *would have relied on the existence of competitors’ service to residential customers through resale.*” *Id.* (emphasis added).

As demonstrated in Qwest’s application, as of October 31, 2002, numerous CLECs in New Mexico are serving 1,033 residential access lines *via* resale. *See* Teitzel Decl. at 41; Exh. DLT-Track A/PI-NM-1 at 4 (New Mexico Wholesale Volumes Data Report). Although no commenter has disputed the accuracy of these data, AT&T and WorldCom assert that resellers in New Mexico are not a “genuine commercial alternative to Qwest” because these resellers charge their customers premium rates and have “targeted . . . only the very small subset of customers who have been denied service by Qwest.” ^{23/} WorldCom Comments at 3; AT&T

their own facilities. *Id.* ¶ 46. As a result, “[i]t is not entirely clear whether the statutory language requires that the competitor or competitors offer predominantly facilities-based service to each category of subscribers — business and residential — independently or to the two classes taken together. . . . [T]he language of [section 271(c)(1)(A)] appears to stop short of mandating actual provisioning of competitive facilities-based telephone exchange services independently to both business and residential subscribers.” *Id.*

^{23/} AT&T also notes that the NMPRC found that the “majority of residential resale lines in New Mexico is served by a single carrier.” *See* AT&T Comments at 14 (citing *NMPRC Final Order* ¶¶ 132,136). This observation is of no legal significance, however, because the Commission has repeatedly held that a BOC need only demonstrate that “*one* ‘competing provider’ constitutes ‘an actual commercial alternative’ to the BOC.” *Qwest 271 Order* ¶ 20 (citing *Oklahoma 271 Order*, 12 FCC Rcd 8695 ¶14) (emphasis added); *see also New Jersey 271*

Comments at 14. However, the FCC has never required a service to be provided at the same price to be considered a “competitive alternative.” 24/ Additionally, the Commission never has required a CLEC to target and serve the same type of customers the BOC is serving in order to be considered a competing provider; the commenters, moreover, fail to cite to any provision of the Act or any Commission order to support the proposition that CLEC customers who were disconnected by Qwest cannot be counted for purposes of Track A. In any case, the record in the New Mexico proceeding indicates that there is, in fact, “customer migration back and forth between Qwest and Comm South,” the predominant New Mexico reseller, *see* Appendix to NMPRC Comments, Transcript of Proceedings, January 23, 2002, Day Two at 141, and that Qwest has a continuing interest in serving the customers it may previously have disconnected for nonpayment. *Id.* at 139.

In the end, the assertion that resellers are targeting a small group of customers can be seen as nothing more than a rehash of the argument that the Track A “competing provider” requirement should include a market-share test. But this argument has repeatedly been rejected by the Commission. *See, e.g., Michigan 271 Order*, 12 FCC Rcd at 20585 ¶ 77;

Order, 17 FCC Rcd 12283 ¶ 13 (concluding “MetTel *alone* serves a sufficient number of residential customers . . . and therefore, is an actual commercial alternative to Verizon in New Jersey”) (emphasis added); *Kansas/Oklahoma 271 Order*, 16 FCC Rcd 6258-59 ¶ 44 (determining “Cox’s customers *alone* satisfy Track A”) (emphasis added).

24/ As indicated above, the FCC has acknowledged that the House of Representatives rejected a version of Track A that would have required the presence of a CLEC capable of offering “service that is comparable in *price*, features, and scope” to that offered by the BOC. *Michigan 271 Order*, 12 FCC Rcd at 20585 ¶ 77 n.170 (quoting H.R. Rep. No. 104-204, at 7 (1995) (emphasis added)).

Kansas/Oklahoma 271 Order, 16 FCC Rcd at 6375-76 ¶ 268. The undisputed 1,033 resale residential lines in New Mexico are sufficient to satisfy the requirements of Track A. 25/

C. The Justice Department Properly Recognizes That Section 271(c)(1) Cannot Be Read to Deny InterLATA Authority When a Local Market is Open

For the reasons discussed above, Qwest believes the record of residential competition in New Mexico fully satisfies Track A precedent. That said, the record clearly indicates that the New Mexico residential market is open to competition, just as it is in Oregon and South Dakota, and as it is in the other nine Qwest states that the Commission already has approved for the provision of interLATA service. Qwest uses the same OSS systems. It adopts the same policies and procedures.

The Commission has recognized that many competitors will chose to focus their resources on larger states over smaller, rural ones, and on the business market over the residential market. 26/ But as the Department of Justice notes in its Evaluation of this application, CLEC business decisions cannot serve as a veto of Section 271 authority for a BOC that has satisfied the competitive checklist and otherwise opened its markets:

The Commission appears to have recognized the difficult situation that would be presented if the requirements of the statute are otherwise met but a BOC that had opened its local market in a state were put into an indefinite limbo that only its competitors could relieve. The Commission has been careful to avoid this “no-man’s land” in interpreting the interaction of the requirements of Track A and Track B. . . . The protections of Track B should not be read out of the statute but should

25/ In Vermont, the Commission held that no more than 345 residential lines provided by a CLEC constituted a greater than *de minimis* amount. *Vermont 271 Order*, 17 FCC Rcd at 7630 ¶ 11.

26/ See *id.* (recognizing evaluation of competition in Vermont requires comparison to “other largely rural states”); see also *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6375-76 ¶ 268 (noting that CLEC entrance strategies beyond BOC control “might explain a low residential customer base”).

remain available to avoid conditioning a BOC's entry in a particular state solely on the actions of entrants who have demonstrated no interest in serving business and residential customers in a local market which has been proven open for both.

DOJ Evaluation at 10-11 n.42 (citations omitted).

The Department has it exactly right. Qwest does not second-guess the business priorities of CLECs. And, as discussed elsewhere, residential competition in New Mexico fully satisfies the requirements of Track A. But to the extent that AT&T and WorldCom have chosen to delay their entry into the residential market in New Mexico, it would violate both the statute and common sense for those decisions to serve as the basis for denying Section 271 authority to Qwest. Indeed, the FCC has noted "Congress' desire to condition approval solely on whether the applicant has opened the door for local entry through full checklist compliance not on whether competing LECs actually take advantage of the opportunity to enter the market." *New York 271 Order*, 15 FCC Rcd at 4163 ¶ 427. Whether CLECs choose to enter a market – in particular, the FCC has noted, the *residential* segment of a market – will largely turn on "[f]actors beyond a BOC's control, such as individual CLEC entry strategies." 27/ Indeed, it is the approach of interLATA competition from Qwest that appears finally to have prompted WorldCom's "plan" to enter the New Mexico residential market in March. *See* WorldCom Comments at 6. To state the obvious, it would be an absurd result if Qwest's interLATA authority were delayed now, reducing WorldCom's incentives to follow through on its entry.

27/ *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6375-76 ¶ 268; *see also Vermont 271 Order*, 17 FCC Rcd at 7660 ¶ 63; *Rhode Island 271 Order*, 17 FCC Rcd at 3352 ¶ 104; and *Massachusetts 271 Order*, 16 FCC Rcd at 9118-19 ¶ 235.

III. QWEST’S OSS COMPLIES WITH THE REQUIREMENTS OF SECTION 271

Very few issues were raised in the comments with regard to Qwest’s OSS. This makes sense. Just two months ago, the Commission found that Qwest’s OSS (and related performance) satisfies the requirements of Section 271, and the same OSS the Commission evaluated then is being used in New Mexico, Oregon and South Dakota. Indeed, the commission in each of these states has endorsed Qwest’s OSS in its comments. *See* NMPRC Comments at 36; OPUC Comments at 10; SDPUC Comments at 4, 7.

The Commission’s earlier approval of Qwest’s OSS has not prevented WorldCom from raising a few issues here. None of them, however, provides any basis for denying this application. For example, WorldCom alleges generally that Qwest’s EDI documentation is flawed and then hypothesizes that the alleged flaws resulted in the rejection of a high percentage of its orders by Qwest’s systems. But, as explained below, Qwest’s EDI documentation is sufficiently detailed that other CLECs (as well as Hewlett-Packard (“HP”), the pseudo-CLEC in the Regional Oversight Committee’s (“ROC’s”) Third Party Test) have been able to successfully implement systems to interface with Qwest’s OSS. To the extent WorldCom experienced order rejections, it was, for the most part, because Qwest’s documentation was misinterpreted by WorldCom. Indeed, the Department of Justice recognized that “WorldCom’s allegations do not directly contradict the evidence on which the Commission relied in approving Qwest’s prior [Section 271] application.” DOJ Evaluation at 8 n.32.

WorldCom’s other OSS-related claims are equally minor and do not reflect systemic flaws in Qwest’s OSS. For example, WorldCom complains that Qwest did not update certain back-end tables to accept the Universal Service Order Code (“USOC”) for touch tone service in Oregon - but WorldCom then immediately acknowledges that this issue has since been

resolved. WorldCom also complains about the processes it must use to validate addresses and submit subsequent orders for accounts that are in the process of being converted when the Customer Service Record (“CSR”) has not yet been updated. But these are the same complaints the FCC dismissed in Qwest III, and the processes about which WorldCom complains will soon be simplified further. That Qwest uses the same processes in its own retail operations is further evidence that they are not discriminatory. *See Qwest 271 Order* ¶ 59. WorldCom’s statements regarding Qwest’s commercial performance also fail to demonstrate discrimination by Qwest.

AT&T complains of a minor omission from Qwest’s Oregon SGAT relating to loop qualification. However, as explained below, this omission has had no practical effect on CLECs because Qwest is providing the same loop qualification tools in Oregon that the FCC reviewed and approved in other states. Moreover, Qwest has amended its Oregon SGAT to resolve AT&T’s concerns.

In short, the issues raised by the parties are neither widespread nor systemic. They do not come close to being Section 271 affecting.

A. Qwest’s EDI Documentation is Effective in Enabling CLECs to Build EDI Interfaces

Despite the fact that the Commission already has examined and approved Qwest’s EDI documentation in the Qwest III proceeding, WorldCom continues to attack the adequacy of that documentation here. WorldCom relies on a few instances in which it alleges it experienced ordering problems because of problems with the documentation Qwest provided to guide WorldCom’s development of an EDI interface. *See WorldCom Comments* at 17-18, Lichtenberg Decl. ¶¶ 29-31. As discussed in this section and those that follow (addressing WorldCom’s specific examples), Qwest’s EDI documentation fully satisfies Section 271.

First, the Commission already evaluated and approved the adequacy of Qwest's EDI documentation when it approved Qwest's nine-state Section 271 application. The Commission expressly concluded that "Qwest provides sufficient documentation to allow competitive LECs to design their OSS interfaces." *Qwest 271 Order* ¶ 144. The Commission based its conclusion in large part on the fact that a number of CLECs had successfully used Qwest's EDI documentation to build EDI interfaces for preordering and ordering transactions. 28/

The commercial evidence of successful development of EDI interfaces by CLECs continues to provide a strong basis to conclude that Qwest's EDI documentation is effective for this purpose. As noted in the Declaration of Lynn M V Notarianni and Christie L. Doherty, Operations Support Systems ("OSS Decl."), as of December 1, 2002, a total of 31 individual CLECs (excluding two pseudo-CLECs) had successfully developed an EDI interface using Qwest's EDI documentation. OSS Decl. ¶¶ 612, 633; Confidential Exh. LN-OSS-138 (Number of CLECs Certification Testing, as of December 1, 2002). The Commission has held previously that such evidence is the best measure of whether EDI documentation is adequate for purposes of Section 271. *See, e.g., Texas 271 Order*, 15 FCC Rcd at 18411 ¶ 120; *Massachusetts 271 Order*, 16 FCC Rcd at 9049-50 ¶ 112.

HP, the pseudo-CLEC in the ROC Third Party Test, also built an EDI interface using Qwest's EDI documentation and EDI Implementation Team. HP conducted certification activities for a broad range of products (including UNE-P) over the EDI interface it had

28/ See Reply Decl. of Lynn M V Notarianni and Christie L. Doherty, Operations Support Systems, filed in WC Docket No. 02-314, October 25, 2002, ¶ 155, *citing* Qwest II Notarianni/Doherty OSS Decl., filed July 12, 2002, in WC Docket No. 02-189, Confidential Exh. LN-OSS-70.

constructed, across four IMA-EDI releases. 29/ It is also noteworthy that at least one CLEC and a pseudo-CLEC have been able to construct and implement an EDI interface using Qwest's documentation in a relatively short time. *See* OSS Decl. ¶ 633; Confidential Exh. LN-OSS-155 (Experiences of Two CLECs in Implementing EDI Interfaces).

WorldCom suggests that its experience building and using an EDI interface is somehow different than that of the many CLECs preceding WorldCom, because WorldCom is providing UNE-P and is targeting mass market customers. WorldCom Comments at *i-ii*, 8-9, Lichtenberg Decl. ¶ 2. WorldCom implies that the evidence that other CLECs have successfully built EDI interfaces using Qwest's documentation is not valid. *Id.* But reality does not bear out WorldCom's assertions. In fact, high volumes of EDI transactions previously have been successfully submitted. During the 12-month period ending November 30, 2002, 21 individual CLECs had submitted a total of 1,400,000 preorder transactions *via* EDI, and 22 individual CLECs had submitted a total of 700,000 order transactions *via* EDI. OSS Decl. ¶ 633; Confidential Exh. LN-OSS-153 (CLEC Pre-Order Volumes); Confidential Exh. LN-OSS-154 (CLEC Pre-Order Volumes). HP also submitted substantial volumes of EDI transactions during the Third Party Test. 30/

29/ For three of the four releases, the products on which HP conducted certification activities included UNE-P. As noted in the OSS Declaration ¶ 639, the products on which HP conducted certification activities can be found in the *Final Report* at Table 12B-1.1 (P-CLEC IMA-EDI Certified Functionality). During this test, HP certified 13 pre-order transactions, 16 products, and five post-order transactions. *Final Report* at 12-B-11 – 12 (HP); Interim Report of the P-CLEC, Version 2.0, March 31, 2001 ("HP Interim Report") (Attachment 5, Appendix G), at 63.

30/ For Test 12, the Pre-Ordering, Ordering and Provisioning (POP) Functional Evaluation, HP transmitted a total of 17,486 pre-order transactions via EDI and 9,656 order transactions over EDI. *Final Report*, Tables 12-8 and 12-15.

Moreover, many of the order transactions submitted during the past year were for resale or UNE-P. Reply Declaration of Lynn M V Notarianni and Christie L. Doherty, Operations Support Systems (“OSS Reply Decl.”), ¶ 8. During the 12 month period ending January 31, 2003, a total of over 69,000 EDI resale POTS and EDI UNE-P POTS conversion order transactions were submitted regionwide. *Id.* 31/ Thus, there does not appear to be anything about volumes or the nature of the product or target customer base that would explain why WorldCom’s experience in using Qwest’s EDI documentation would differ from that of the third party tester or other CLECs. As the Department of Justice observed, “WorldCom neither presents detailed underlying data nor explains why its experience using its own systems appears to have been more negative than that using Z-Tel’s systems.” DOJ Evaluation at 8 n.32. Indeed, no CLEC challenged the adequacy of Qwest’s EDI documentation in the first two Qwest Section 271 applications, and it was not until WorldCom filed comments on October 15, 2002, in connection with the nine-state application, that *any* party took issue with Qwest’s showing. Nor did any other party in its initial comments on this application take issue with the adequacy of Qwest’s EDI documentation.

Second, the findings of KPMG and HP in the ROC Third Party Test support the Commission’s prior conclusion on this point in the *Qwest 271 Order*. As discussed in the OSS Declaration, the ROC Third Party Test evaluated the efficacy of Qwest’s EDI documentation in three reviews: (1) the Order and Transaction Creation Documentation Evaluation (Test 10); (2) the P-CLEC OSS Interface Evaluation (Test 12-B); and (3) the OSS Interface Development Review (Test 24.6). OSS Decl. ¶¶ 636-643. Qwest satisfied each of these tests. In particular,

31/ As explained in the OSS Reply Declaration, for purposes of EDI documentation and interface coding, resale and UNE-P orders are essentially the same. OSS Reply Decl. ¶ 8 n.14.

HP concluded that the IMA Disclosure documentation and the EDI Implementation Guidelines are readily available to CLECs, are comprehensive in detail, and can easily be understood by CLECs. *See Final Report* at 10-A-38 (HP). *See also* OSS Decl. ¶ 638. Qwest satisfied every one of the Third Party Test criteria regarding EDI documentation. OSS Decl. ¶¶ 636-643.

The specific EDI documentation issues cited by WorldCom do not undermine the Commission's prior conclusion that Qwest's EDI documentation is adequate under Section 271. *See WorldCom Comments* at 17. For the most part, the cited instances involved situations in which WorldCom interpreted the documentation and designed its EDI interface in a way that other CLECs had not, and that Qwest had not anticipated, as discussed in detail below and in the OSS Reply Declaration. Qwest's EDI implementation team has worked with WorldCom to clear up any confusion on WorldCom's part and has undertaken to clarify the documentation on a going-forward basis if necessary. *See OSS Reply Decl.* ¶ 10. This is a normal part of the CLEC EDI interface development and testing process. As described in the OSS Declaration, the EDI Implementation team works closely with CLECs to assist them in building their EDI interfaces and in using the documentation provided. OSS Decl. ¶¶ 613-615. The Commission itself recognized the importance of Qwest's responsiveness to CLEC documentation questions in the *Qwest 271 Order* ¶ 55 n.180.

Finally, Qwest's change management process, which the Commission approved in the *Qwest 271 Order*, provides procedures and a forum for making changes to EDI documentation. The change management procedures, which were jointly developed by CLECs and Qwest, provide a process for CLECs "to submit change requests to alter Qwest EDI

documentation, add additional features to IMA-EDI, or supplement its functionality.” ^{32/} The CMP procedures also provide for “advance notice of new releases, timeframes for issuance of documentation prior to implementation, opportunity for CLEC input into documentation, and prescribed content of documentation.” OSS Decl. ¶ 630; *see also, e.g.*, Change Management Decl., Exh. DLF-CMP-2 (CMP Framework) §§ 5, 8, 12. Finally, the CMP includes procedures that help ensure that when CLECs encounter troubles in production, or when problems are identified by Qwest, those troubles will be disclosed to other CLECs if those troubles affect them. *See* Change Management Decl. at Section V(D); CMP Framework § 12.

WorldCom’s change request (“CR”) asking that Qwest adopt a single source of EDI documentation is currently being addressed through the change management process. ^{33/} In the January 28 meeting to discuss this CR, Qwest provided the CLECs with a “level of effort” for the change request, and offered to break it into parts so that it could be implemented over more than one EDI release. *Id.* (Minutes of January 28, 2003 Meeting). The most recent systems CMP meeting was held on February 20, 2003. There, the WorldCom CR and related EDI documentation suggestions were discussed. Next steps to make further progress on this subject were discussed and will be reflected in the minutes of that meeting, which will be available soon on the Qwest website. *See* www.qwest.com/wholesale/downloads/2002/cmp/

^{32/} *See* OSS Decl. ¶ 630; Declaration of Dana L. Filip on Change Management (“Change Management Decl.”), Exh. DLF-CMP-2 (CMP Framework), § 5; *see also* Change Management Decl. § III(C)(4). As noted in the OSS Declaration, an example of this process is Change Request SCR122701-1, which resulted in a new document, 9.0 Populated EDI X12 Mapping Examples (Exh. LN-OSS-143). OSS Decl. ¶ 630 n.111.

^{33/} *See* Reply Exh. LN-OSS-1 (Excerpt from Systems Interactive Report for SCR0903002-05, Single Source Document for Implementing EDI). This document may also be accessed at the following URL: www.qwest.com/wholesale/downloads/2002/cmp/CLECQwestCMPSystemsInteractiveReport.PDF.

[CLECQwestCMP_SystemsInteractiveReport.PDF](#). The Commission acknowledged in the *Qwest 271 Order* that WorldCom's change request was pending, yet did not find that its existence suggested that Qwest's EDI documentation was somehow inadequate; on the contrary, the Commission recognized that the CMP was the proper forum for considering WorldCom's requests for changes in EDI documentation. *Qwest 271 Order* ¶ 55 n.180.

WorldCom also cites ten principles that it believes should guide Qwest in its documentation going forward, asserting that Qwest has not agreed to and does not follow these principles. WorldCom Comments ¶ 18, Lichtenberg Decl. ¶ 31. WorldCom cited these same principles during the CMP meeting discussion of its single source EDI documentation change request. Qwest has agreed to address these items when the WorldCom change request is worked. *See* January 28, 2003 Meeting Minutes, OSS Reply Exh. LN-1 (Excerpt from Systems Interactive Report for SCR0903002-05, Single Source Document for Implementing EDI). In fact, Qwest already does generally follow most if not all of these guidelines, and has for some time, when it revises or clarifies its EDI documentation. OSS Reply Decl. ¶ 14. As the WorldCom CR and the related CMP forum discussions show, the change management process provides a vehicle for EDI documentation proposals to be considered by all affected CLECs and to be crafted to meet their sometimes different objectives.

In sum, WorldCom has provided no evidence that would cause the Commission to change its previous conclusion that Qwest's EDI documentation is effective in enabling CLECs to build EDI interfaces.

B. The Instances of Order Rejects Cited by WorldCom Do Not Call Into Question the Efficacy of Qwest's EDI Documentation or the Adequacy of Its OSS

1. Feature Identification

WorldCom claims that many of its orders were rejected during a three day period in January because Qwest's documentation failed to make certain distinctions between CSR formats for single- and multi-line accounts. *See* WorldCom Comment at 9-11, Lichtenberg Decl. ¶¶ 6-12. But, as explained below, the distinctions between these types of accounts are entirely logical.

WorldCom correctly notes that conversion orders submitted through Qwest's OSS currently require a carrier to distinguish between the features the end user wishes to retain (based on its existing service) and new features the end user seeks to add. *See id*; *see also* OSS Reply Decl. ¶ 15. This requires the carrier to identify the existing features on the end user's account by examining the CSR. *See id*. The CSR for a single line account typically identifies each feature without repeating the telephone number ("TN") after it because, by definition, each such feature is associated with that single line. ³⁴ *See id*. But, for multi-line accounts, the CSR lists the TN after each feature so it is clear to which line that feature applies. *See id*.

WorldCom contends that Qwest's EDI documentation did not articulate a distinction between single- and multi-line accounts, and that, as a result, WorldCom designed its EDI interface to seek and extract feature information only when associated with a TN. *See* WorldCom Comments at 9-10, Lichtenberg Decl. ¶ 8. According to WorldCom, because feature

³⁴/ While it is possible for a single-line account to include the TN after feature information (if the order was coded that way), the absence of a TN after certain features does not mean that those features do not exist on the account. WorldCom programmed its EDI to treat only those features followed by TNs as existing features based on an erroneous assumption. *See* OSS Reply Decl. ¶ 15 n.22.

information for single line accounts does not always include the TN after each feature, WorldCom's orders for single line accounts did not identify any existing features and thus designated all of the features the end user was ordering as new. *See id.* This, in turn, prevented WorldCom's orders from correctly distinguishing between features the end user wished to retain and those it sought to add, resulting in a reject when the order was submitted. *See id.*

Although Qwest's EDI documentation does not explicitly distinguish between the feature detail on the CSR for single- and multi-line accounts, the difference should have been taken into account by WorldCom's EDI development effort. *See* OSS Reply Decl. ¶ 16. This is because Qwest's Developer Worksheets, which are part of the EDI Disclosure Document, identify feature detail as "optional," which means that a feature can appear on a CSR without additional detail such as a TN. *See id.*; LN-OSS-9 (IMA-EDI Appendix A – Developer Worksheets – Pre-Order) Disclosure Document) at App. A, p. 40. Indeed, Qwest has long been processing orders submitted by CLECs that have identified features properly.

When WorldCom communicated to Qwest that it was experiencing these rejections, Qwest agreed to make its EDI Development Team available to assist WorldCom during the weekend it planned to code its changes. ^{35/} *See* OSS Reply Decl. ¶ 18. But, instead of recognizing the efforts Qwest's EDI Development Team was willing to make on its behalf (WorldCom did not contact Qwest's EDI Development Team that weekend), WorldCom now alleges that Qwest "refused to announce" the difficulties WorldCom experienced to other CLECs. *See* WorldCom Comments at 11, Lichtenberg Decl. ¶ 12. In nearly the same breath,

^{35/} Although Qwest's service manager at first indicated to WorldCom that she believed CSR distinctions between single- and multi-line accounts were limited to the Eastern region, she told WorldCom that she would have to investigate the matter further. The very next day, after receiving additional information from WorldCom, she notified WorldCom that the distinctions applied to all regions. *See* OSS Reply Decl. ¶ 18 n.25.

however, WorldCom concedes that “Qwest has agreed [to] change its documentation” to reflect the distinction between feature detail on CSRs for single- and multi-line accounts. ^{36/} *See id.* Indeed, Qwest notified the CLEC community of a proposed change to the PCAT to add information about the difference between single- and multi-line accounts on February 17, 2003. *See* OSS Reply Decl. ¶ 18. Based on CMP guidelines, the change will become effective no later than March 10, 2003, after CLECs have had an opportunity to comment. *See id.*; Reply Exh. LN-2 (Proposed Documentation Change for Feature Identification) at 3, *also available at* www.uswest.com:/wholesale/cmp/review.html. So, contrary to WorldCom’s assertions, Qwest has made the distinction between single- and multi-line accounts in this context readily apparent to CLECs.

2. Area Codes on “Forward To” Numbers

WorldCom alleges that some of its orders were rejected because Qwest’s documentation did not specify that, when placing an order for call forwarding, the old “forward to” number (which currently must be provided) needs to include ten, not just seven, digits. *See* WorldCom at 13-14, Lichtenberg Decl. ¶¶ 13-19. But Qwest’s documentation does, in fact, make this distinction. Specifically, the negotiated business rules in Qwest’s EDI Disclosure Document specify that feature identification detail accompanying call forwarding USOCs (CFN, CFNB and CFND) should include ten digits. *See* OSS Reply Decl. ¶ 9; Qwest IV, Att. 5, App. P (Qwest EDI Disclosure Document) at Appendix C, p. 125, reference line 60, *also available at* www.uswest.com/disclosures/netdisclosure409.html.

^{36/} At WorldCom’s request, and in order to allow all CLECs to be able to comment on the proposed documentation update, Qwest issued a Level II product and process change notification rather than a Level I notification. A Level I notification would have enabled Qwest to effectuate the change more quickly because Level I changes do not require CLEC input. *See* OSS Reply Decl. ¶ 18 n.27.

Moreover, Qwest is implementing a CMP CR, with a target date of February 28, 2003, that will relax the edit that currently requires a ten digit telephone number. *See* OSS Reply Decl. ¶ 20; Reply Exh. LN-3 (Excerpt from Systems Interactive Report for SCR062702-09ES, Relaxing the Edit on Ten Digit “Forward To” Numbers), *also available at* www.qwest.com/wholesale/cmp/changerequest.html. WorldCom claims that Qwest has “refused” to implement this simple work-around. *See* WorldCom at 13, Lichtenberg Decl. ¶ 18. This clearly is not true. In June 2002, a different CLEC, Eschelon, submitted a request through CMP that old “forward to” numbers no longer require ten digits on orders for call forwarding. *See* OSS Reply Decl. ¶ 20. But, when this CR was discussed at a Change Management meeting in July 2002, it was prioritized as 36th (out of 60 CRs) by all CLECs, and, notably, even lower (42nd out of 60 CRs) by WorldCom. *See id.* Eschelon’s CR therefore did not qualify for EDI version 12.0 and instead became a candidate for EDI version 13.0. ^{37/} *See id.* Because this issue has since grown in importance to CLECs, Qwest is, as noted above, implementing the change on an expedited basis with a target date of February 28, 2003. *See id.* But this particular turn of events is nevertheless notable because it demonstrates that WorldCom clearly knew – or should have known – that a ten digit “forward to” number is needed.

Qwest’s implementation of a “Migrate-as-Specified” feature in EDI version 12.0 also should help resolve WorldCom’s concerns in this area, as CLECs will no longer have to distinguish between new and existing features; nor will CLECs have to identify the “change

^{37/} Notably, when this CR was prioritized by CLECs for EDI version 13.0 on December 19, 2002 (which predated WorldCom’s initiation of new, conversion and disconnect orders in Qwest’s region by less than four weeks), WorldCom still prioritized it at a relatively low 14 (out of 50 CRs). *See* OSS Reply Decl. ¶ 20 n.31.

from” existing feature detail when making changes (such as changing the call “forward to” number) on their conversion LSRs. 38/ See OSS Reply Decl. ¶ 21.

C. The Remaining OSS Issues Raised are Minor and Do Not Affect a Finding of Section 271 Compliance

1. Updating USOC Tables in Oregon

WorldCom claims that its orders requiring a “Touch Tone Business” (“TTB”) USOC were rejected in Oregon because Qwest did not properly code its back-end tables to accept that USOC in that state. See WorldCom at 14-15, Lichtenberg Decl. ¶¶ 20-21. But WorldCom then concedes that this issue has been fully resolved and that it is no longer experiencing these rejects. See *id.* WorldCom’s experience therefore is isolated, at best, and has no bearing on whether Qwest’s OSS meets the requirements of Section 271.

The majority of Qwest’s systems no longer require the submission of a TTB USOC with an order because touch tone service is now standard in most states. See OSS Reply Decl. ¶ 22. Nevertheless, the TTB USOC is required in certain areas, including locations in South Dakota. Qwest acknowledges that, initially, it incorrectly informed WorldCom that the TTB USOC was required in Oregon, but Qwest rectified the matter expeditiously. See *id.* ¶ 23. When WorldCom began submitting orders with TTB USOC based on information provided by Qwest, WorldCom experienced rejects and reported this to Qwest on January 21, 2003. See *id.* To resolve this, Qwest agreed to add the TTB USOC to the necessary tables in Oregon by January 27, 2003, in order to allow the LSRs to be accepted in that state. See *id.* As a result,

38/ It is not clear to Qwest why WorldCom believes that the “Migrate-as-Specified” feature Qwest plans to implement in EDI version 12.0 will continue to require feature detail for “complex” features such as call forwarding. See WorldCom at 14, Lichtenberg Decl. ¶ 19. To be clear, carriers will not be required to specify an old “forward to” number when using “Migrate-as-Specified.” Only the new “forward to” number will, of course, be required. See OSS Reply Decl. ¶ 21 n.32.

WorldCom was able to continue ordering without modifying its internal procedures and without experiencing any affect on the provisioning process. *See id.*

Without providing any specifics, WorldCom claims that, beginning February 1, 2003, orders containing “RCU” 39/ and “NKS” 40/ USOCs were rejected in a manner “similar” to its TTB-related rejects. *See* WorldCom at 15, Lichtenberg Decl. ¶ 22. But this is hardly surprising. Qwest’s PCAT states clearly that Call Curfew – the feature associated with the RCU USOC – uses Qwest’s Advanced Intelligence Network and therefore is not available for UNE-P orders, which are the type of orders WorldCom submits. *See* OSS Reply Decl. ¶ 24. 41/ Thus, to the extent WorldCom was submitting UNE-P orders with RCU USOCs, they could not have been accepted by Qwest’s systems and should have been – and indeed were – rejected. *See id.*

As for WorldCom’s claim regarding the NKS USOC, Qwest’s PCAT could have been clearer, but this issue affected only a small number of WorldCom orders. *See* OSS Reply Decl. ¶ 25. Specifically, between January 18 and February 14, 2003, only four WorldCom orders were rejected because of the inclusion of an NKS USOC. *See id.* Both NKS and the USOC “NKM” represent the Caller ID Blocking feature; but service provisioned through UNE-P requires that the NKM USOC be used. *See id.* WorldCom, which uses UNE-P, submitted orders

39/ Qwest’s RCU USOC relates to a “Call Curfew” feature, which enables end users to set time-of-day restrictions on incoming and outgoing calls.

40/ Qwest’s NKS USOC relates to a “Caller ID Blocking” feature.

41/ *See also* Call Curfew Section of PCAT, *available at* www.qwest.com/wholesale/clecs/features/call_curfew.html; UNE-P Section of PCAT, *available at* www.qwest.com/wholesale/pcat/uneppots.html (noting that “products that are not available with UNE-P . . . [include] . . . Advanced Intelligent Network (AIN) services”).

for Caller ID Blocking with the NKS, not NKM, USOC, which is why those orders were rejected. 42/ *See id.*

Qwest has notified CLECs that it has initiated a change to enable CLECs to use either the NKS or NKM USOC to request Caller ID Blocking. 43/ *See* OSS Reply Decl. ¶ 26; Reply Exh. CLD-4 (CMP Notice on NKM/NKS USOC). Qwest also has made clear to CLECs that, in the interim, they should use only the NKM USOC to request this feature. *See id.* The change initiated by Qwest is expected to be in place by April 11, 2003, after CLECs have had an opportunity to comment on Qwest's proposed change and Qwest has had an opportunity to implement it. *See id.* The implementation of this change should resolve any concerns WorldCom may have had about which USOC it should be submitting. *See id.*

2. Address Validation for Second Lines

WorldCom contends that some of its orders are rejected because it is unable to validate addresses for second lines by inputting the end user's telephone number into PREMIS, which is the data source for Qwest's address validation tool. *See* WorldCom at 15-16, Lichtenberg Decl. ¶¶ 23-25. It is unclear to Qwest, however, why WorldCom insists on using Qwest's address validation tool in this manner. *See* OSS Reply Decl. ¶ 27. Qwest's documentation states explicitly that address validation by TN can only be performed on "Main" or "Billing" telephone numbers. *See id.*; *see also* Attachment 5, Appendix P (Qwest EDI Disclosure Document) at Chapter 4.1, page 2, first paragraph, *also available at*

42/ Qwest learned that WorldCom was simply copying the USOCs from the existing account to the account it was converting. This resulted in WorldCom requesting the NKS USOC even though its use of UNE-P required it to use the NKM USOC. *See* OSS Reply Decl. ¶ 25 n.38.

43/ Either USOC will provide the Caller ID Blocking functionality. Allowing the use of either USOC will facilitate conversions to UNE-P when CLECs simply copy the USOC from the existing account.

www.uswest.com/disclosures/netdisclosure409.html; *see also* Pre-ordering Overview PCAT, Frequently Asked Questions (FAQs) No. 4, *available at* www.qwest.com/wholesale/clecs/preordering.html. Second lines do not qualify as “Main” or “Billing” telephone numbers, which is why they should be validated by address. *See id.*

Qwest’s address validation tool is not well-suited for address validation by TN because its source is an address database (PREMIS) that does not contain all working services or telephone numbers for a given address. *See id.* ¶ 28. Qwest’s documentation therefore informs CLECs to validate addresses by typing the end user’s address, rather than TN, into the tool. ^{44/} *See id.* Nevertheless, WorldCom seems to insist on attempting to validate end user address information by TN. But doing so, as WorldCom now realizes, is not optimal because not all TNs can be accommodated – and thus be read by – the address validation tool. *See id.*

WorldCom claims that the process of typing end user addresses (rather than TNs) into the address validation tool is cumbersome and prone to keystroke errors by its service representatives. *See* WorldCom at 15, Lichtenberg Decl. ¶ 25. But such keystroke errors are equally possible when typing TNs, and WorldCom offers no evidence that the former would lead to fewer keystroke errors than the latter. *See* OSS Reply Decl. ¶ 29. Regardless, the “near-match” capability of Qwest’s address validation tool – which results in multiple potential responses being returned when minor keystroke errors are made – renders WorldCom’s argument moot. *See id.* In fact, WorldCom can use the near match capability to select the correct address and then automatically populate the address fields on the LSR. *See id.*

^{44/} Precise addresses may not be available for certain rural end users whose premises may, for example, be identified by milepost along a highway.

In light of the available documentation and guidance provided by Qwest, it is unclear why WorldCom insists on trying to validate addresses by TN. Nevertheless, even though the FCC has never required it, *see Qwest 271 Order* ¶ 56, Qwest is scheduled to implement a Migrate-by-TN function in EDI version 12.0, which will enable CLECs to submit UNE-P conversion LSRs based on the TN and minimal address information. *See OSS Reply Decl.* ¶ 30.

3. Process for Updating CSRs

WorldCom complains that it takes Qwest too long to update CSR information, and that the requirements for submitting subsequent requests on a conversion LSR before the CSR has been updated is cumbersome. *See WorldCom* at 16-17, *Lichtenberg Decl.* ¶¶ 26-28. But this is virtually the same claim that WorldCom raised – and the FCC rejected – in *Qwest III*. *See Qwest 271 Order* ¶ 59. The FCC has held that Qwest’s interval for updating CSRs “is the same for both [W]holesale and [R]etail accounts.” *Id.* 45/ Moreover, because CLECs use the same process as Qwest to submit subsequent orders before the CSR has been updated, the process cannot be – and is not – discriminatory. *See OSS Reply Decl.* ¶ 31.

Nevertheless, to improve the CLEC experience in this area, Qwest expects to implement an additional system capability in EDI version 12.0 to simplify the process for submitting subsequent LSRs for such orders. *See id.* ¶ 32. This change will create a new field to allow CLECs to specify that the LSR submitted is a subsequent change to a pending order. *See id.* This will prevent Qwest’s OSS from running an “ownership” check on such orders before processing, making the submission of such orders easier. *See id.*

45/ *See also* Qwest November 22a 2002 *Ex Parte* Letter, WC Docket No. 02-314 (stating that, of the 10,000,000 service orders processed from June through September 2002, 96.53 percent of CSRs posted within five days and 87.12 percent of CSRs posted within 24 hours).

4. Commercial Performance Results

WorldCom claims that Qwest's commercial performance for, among other things, flow-through and billing accuracy reveals deficiencies in its OSS. *See* WorldCom at 18, Lichtenberg Decl. ¶ 32. But the performance results WorldCom cites to support its claim reflect region-wide results, not the results for the three application states. *See id.* Qwest's commercial performance results in New Mexico, Oregon and South Dakota– the only states at issue in this proceeding – demonstrate that Qwest provides CLECs with flow-through and accurate bills on a non-discriminatory basis. *See* Williams Decl. ¶¶ 212-276 (Flow-Through under PO-2B) and 303-308 (Billing Accuracy under BI-3A). ^{46/} Indeed, the Department of Justice notes that “the performance data submitted in support of this application appear generally consistent with those submitted in support of [the Qwest III] application,” which was approved. DOJ Evaluation at 2. WorldCom's performance-related claims have no merit.

5. Loop Qualification Language in Oregon SGAT

The only OSS-related issue raised by AT&T pertains to an SGAT provision on loop qualification. *See* AT&T Comments at 29-30. The provision, which, according to AT&T, can be found in all of Qwest's SGATs except Oregon, permits CLECs to obtain information on spare copper facilities where Qwest has deployed significant amounts of Integrated Digital Loop Carrier (“IDLC”) technology so they can determine whether there are facilities that can readily accommodate advanced services such as Digital Subscriber Line (“DSL”). *See, e.g.,* Qwest IV, App. B, Tab 1, NM SGAT at § 9.2.2.2.1.1.

^{46/} In most of the instances in which Qwest missed the benchmark or parity standard under these PIDs, it missed by only a handful of orders or order volumes were low (preventing the result from being statistically significant). *See* Williams Decl. ¶¶ 212-276, 303-308.

AT&T claims that Qwest's SGAT in Oregon should include this provision. *See* AT&T Comments at 29-30. We agree. We note that, in order to minimize confusion in the course of the Section 271 proceeding in Oregon, Qwest would modify its SGAT to reflect only (1) those terms agreed to by all parties, or (2) terms specified by the OPUC. *See* OSS Reply Decl. ¶ 34. As a result, it appears that this provision – which was neither subject to agreement by the parties (it was initially opposed by AT&T) nor specified by the OPUC for inclusion – was not added to Qwest's SGAT in Oregon. *See id.* Nevertheless, the option of obtaining this type of information has been available to CLECs in Oregon and elsewhere since August 2001. *See id.* Qwest now has added this reference to its Oregon SGAT by filing an amendment on February 21, 2003. *See id.* This amendment, assuming it is approved by the OPUC on March 31, will become effective on April 1, 2003. 47/ *See id.*

IV. QWEST'S COMMERCIAL PERFORMANCE CONTINUES TO SATISFY THE REQUIREMENTS OF SECTION 271

There is no merit to WorldCom's assertion that "Qwest's performance metrics show repeated failures to meet performance measures." WorldCom at 18 (citing Lichtenberg Decl. ¶ 32). As WorldCom acknowledges, its allegations are based solely on regionwide performance results rather than on data particular to the application states. *Id.* WorldCom's allegation is thus only tangentially relevant, at best, to the issue of whether Qwest satisfies performance obligations in New Mexico, Oregon and South Dakota. While the performance results for these three states contribute to Qwest's regionwide results, the company's regionwide

47/ It also is worth noting here that Qwest successfully implemented router testing for line sharing on February 12, 2003, as promised in the Qwest IV Application. *See* Declaration of Karen A. Stewart, Line Sharing/Line Splitting ¶ 35.

results, standing alone, cannot overcome its demonstration that it satisfies each of the PIDs in the three application states.

It is noteworthy in this regard that, as to each of the nine states for which Qwest received Section 271 authority in the *Qwest III* decision, the Commission found Qwest's performance sufficient to satisfy its obligations under the compliance checklist. ^{48/} That performance included all the months relied upon in the instant application, except for November 2002, and the nine states make up the majority of the 14 states contributing to Qwest's regionwide results cited by WorldCom. Taken with the three application states here, for which Qwest also meets its performance obligations, virtually all states in Qwest's region are represented and demonstrably satisfy each performance metric.

With respect to the three application states specifically, Qwest's performance for each PID WorldCom targets in its comments demonstrates that Qwest provides the checklist items at acceptable levels of quality. As set forth in the Declaration of Michael G. Williams ("Williams Decl."), Qwest performance on UNE-P repair satisfies the relevant performance metrics for each of New Mexico, Oregon and South Dakota. *See* Williams Decl. ¶¶ 331, 333, 335, 339, 342, 345, 347, 349, 352. Qwest's performance under its line sharing repair PIDs for New Mexico and Oregon also was generally strong. ^{49/} The trouble rate for 911/E911 was zero

^{48/} The Department of Justice has noted that "the performance data submitted in support of [the Qwest IV] application appear generally consistent with those submitted in support of [the Qwest III] application." DOJ Evaluation at 2.

^{49/} *See id.* ¶¶ 391, 394. There were no CLEC orders for line sharing in South Dakota between August and November 2002. *Id.* ¶ 395. Thus, irrespective of WorldCom's claims regarding Qwest's regionwide performance, there can be no claim that Qwest failed to meet any performance metric with respect to line sharing. It also bears noting that WorldCom does not order line sharing from Qwest, so it is curious that WorldCom raises line sharing performance in its comments.

for New Mexico, *id.* ¶ 413, and was nonexistent in South Dakota, *id.* ¶ 418; and the four-month average trouble rate in Oregon was at parity in all four months and never higher than 0.79 percent. *Id.* ¶ 416. Finally, Qwest had no performance results for EELs in New Mexico (and thus no performance deficiencies); in Oregon and South Dakota, where volumes are so low that even a single missed commitment can cause Qwest to miss its PID, Qwest exceeded the benchmark in three of the last four months for each state. *Id.* ¶ 355. Qwest's performance on each of these PIDs for December is generally consistent with its performance in August through November. *See generally* Qwest's *ex parte* submission 1/2903B.

Finally, even were the Commission to consider WorldCom's assertions based on Qwest's regionwide performance, there still would be no basis for the claim that Qwest experienced repeated failures to meet the PIDs to which WorldCom refers. In numerous instances, the statistical disparity cited does not equate to competitive disadvantage. In fact, WorldCom points out statistical differences in some cases where actual differences are so tiny that common sense dictates that they cannot impede the ability of CLECs to compete.

For example, with respect to OP-3C Installation Commitments Met - No Dispatches for Qwest DSL for October and November, Qwest's results were above 97 percent, with the statistical parity misses being due to retail results being above 99 percent, so the actual difference is not competitively significant. *See* Lichtenberg Decl., Att. Also in this category is OP-5 New Service Quality for Qwest DSL results for October through December, where the actual performance difference is under 1 percent in every month, and the results are at or above 99 percent in each case. *Id.* WorldCom's complaint about the MR-8 - Trouble Rate for UNE-P (Centrex) also is misplaced, as the actual trouble rate for October through December is less than 1 percent and the actual difference between CLEC and Qwest trouble rates is also less than

1 percent. *Id.* Similarly, for MR-8 - Trouble Rate for UDIT above the DS1 Level, the actual trouble rate is under 2.0 percent and the actual difference between the CLEC and Qwest trouble rates is less than 1.0 percent. *Id.*

Moreover, with respect to the trouble rate for E911 (MR-8), which WorldCom claims Qwest missed in six of the last twelve months, the average rate for the most recent four months (September-December) was at parity regionwide in two of four months, and the CLEC trouble rate averaged a miniscule 0.21 percent versus 0.07 percent for Qwest retail – a competitively insignificant difference. 50/ All E911 trouble reports cleared in less than two hours, well ahead of the four-hour target. *See id.* at 286 (MR-6D).

With respect to the repair repeat report rate for UNE-P-POTS non-dispatch (MR-7C), Qwest's regional performance results for MR-7C* (which tracks the actual repeat trouble rate by excluding all trouble reports where no trouble is found ("NTF") and no other report follows within 30 days of the original) shows Qwest performing at parity with like retail service if NTF reports are excluded. 51/ There are legitimate explanations for all of the other alleged PID misses alleged by WorldCom, including instances where customers requested future appointment times. These explanations are set forth in the Williams Reply Declaration submitted in support of these reply comments.

50/ See January-December 2002 Regional Commercial Performance Results at 288 (MR-8). Moreover, Qwest's January 2003 regional performance results show the E911 trouble rate at parity, with CLECs experiencing a trouble rate of 0.03 percent versus 0.07 percent for Qwest. See February 2002-January 2003 Regional Commercial Performance Results at 288 (MR-8).

51/ Reply Declaration of Michael G. Williams, Performance Measures Results ("Williams Reply Decl.") ¶ 10. Qwest also notes that MR-9, another PID for which WorldCom claims Qwest's performance is deficient, is a metric that the Commission has not analyzed in prior 271 applications. In any event, with respect to regionwide performance, Qwest met repair appointments at a level of 90% or greater each month throughout 2002. *Id.* ¶ 11.

V. QWEST’S NETWORK ELEMENTS AND OTHER CHECKLIST OFFERINGS COMPLY FULLY WITH TELRIC AND OTHER APPLICABLE RULES.

A. Qwest’s Pricing and Rate Structure for Transport Entrance Facilities Satisfy TELRIC and Other Applicable Rules, as the Commission Has Already Found.

In the *Qwest 271 Order*, the Commission rejected AT&T’s argument concerning Qwest’s rate structure for the entrance facilities (or “EUDIT”) component of transport and interconnection trunks. The Commission found no TELRIC error in the state commissions’ decisions to permit Qwest to charge flat-rate, non-distance-sensitive rates for entrance facilities transport, because “the Commission’s TELRIC rules do not specify that such charges must be based on distance.” *Qwest 271 Order* ¶ 365. The Commission also noted that it had approved numerous 271 applications in states that used the identical rate structure. *Id.* It “dismiss[ed] AT&T’s argument that the charge for the link between a competitive LEC switch and a Qwest switch should be recovered in the same manner as links between Qwest switches,” because, the Commission found, AT&T had failed to refute Qwest’s showing that “there are both economic differences and engineering differences that warrant a different rate structure and different rates.” *Id.* ¶ 366.

Notwithstanding the Commission’s clear holding, AT&T now repeats nearly identical arguments challenging the same rate structure for the same elements in New Mexico, Oregon, and South Dakota. AT&T Comments at 23-27; Wilson Decl. ¶¶ 7-19. To the extent AT&T’s arguments are the same as those the Commission already rejected in the *Qwest 271 Order*, the Commission should reject them again here for the same reasons. The only “new” arguments AT&T raises here are factually unfounded, as explained in the Thompson/Freeberg Reply Declaration.

First, AT&T submits that some CLEC switches serve more lines than some Qwest switches, and argues that this refutes Qwest's contention that transmission facilities between CLEC points of interface and Qwest serving wire centers are typically lower capacity than transmission facilities among Qwest offices. AT&T Comments, Wilson Decl. ¶¶ 13-15. But AT&T is wrong as a factual matter. Interoffice circuits are used for multiple purposes (including carrying non-switched as well as switched traffic), and thus tend to be larger capacity trunks than entrance facilities, which serve only the single purpose of connecting a Qwest wire center with a CLEC point of interface. The size of a CLEC switch, in terms of the number of lines served, relative to the size of Qwest switches, thus is not necessarily indicative of the amount of traffic that is transported over the interoffice facilities versus the entrance facility. In fact, in Oregon, New Mexico and South Dakota, Qwest has not provisioned any entrance facilities to CLECs using a system with a capacity higher than OC-3. By contrast, in New Mexico and Oregon, 96% to 100% of Qwest's interoffice transmission facilities are at a OC-48 system capacity; and in South Dakota, about 65% of Qwest's interoffice facilities are at a OC-48 system capacity. The greater economies of scale and scope that are achieved by interoffice transport facilities means that, all else being equal, a given circuit at any given capacity level (e.g., a DS1) costs less to provide over interoffice facilities than over entrance facilities because the investment and other costs can be spread over a greater number of circuits. Thompson/Freeberg Reply Decl. ¶¶ 10-12.

Second, AT&T disputes Qwest's showing that, even apart from these differences in capacity, circuits combining entrance facilities with interoffice facilities are more costly (on average) than interoffice transport circuits alone because the former require additional electronics much more often than do the latter. AT&T Comments, Wilson Decl. ¶¶ 16-18. But AT&T's argument on this point fails as well. An interoffice transport circuit linking any two

Qwest central offices within a local calling area, more often than not, can be established without the need for any intermediate electronics. By contrast, in most cases dedicated circuits between CLEC points of interface and Qwest central offices must pass through an intermediate point (the Qwest serving wire center) and must be accompanied by *additional* multiplexers and other electronic equipment. This is due to the fact that the traffic on an entrance facility is destined for multiple Qwest wire centers and must be disaggregated and multiplexed to the higher interoffice transport level. Thompson/Freeberg Reply Decl. ¶¶ 13-14.

The additional electronic equipment that is typically utilized at the serving wire center raises the cost of circuits combining interoffice facilities with entrance facilities relative to interoffice transport alone. Moreover, the non-distance-sensitive cost of the central office electronics is the dominant cost driver for relatively short (on average 2-3 mile) entrance facilities, accounting for 73% of total costs on average for DS1 facilities and 80% for DS3 facilities. By contrast, for interoffice facilities, which tend to be significantly longer (10-20 miles on average), the distance-sensitive outside plant costs account for 55% to 90% of total costs on average for both DS1 and DS3 facilities (depending on the distance being traversed and the capacity of the circuit). Thompson/Freeberg Reply Decl. ¶¶ 8-9.

Finally, and most significantly, contrary to AT&T's bottom-line argument, 52/ Qwest's rates for a representative composite of entrance facilities (EUDIT) and interoffice transport (UDIT) in the states at issue here are well within the zone of reasonableness established by the corresponding composite rates applicable in other states for which this Commission has granted section 271 authorization. The TELRIC-compliant transport rates in Oregon, New

52/ AT&T Comments, Wilson Decl. ¶ 10 ("The principal effect of these 'entrance facility' charges is dramatically to raise the price of interconnection . . .").

Mexico and South Dakota are not significantly higher than transport rates in other states that include only the AT&T-preferred distance-based rates, or comparable rates in other states. *See* Thompson/Freeberg Reply Decl. ¶ 15; Reply Exh. JLT/TRF-1. The Commission should once again reject AT&T's challenge to Qwest's pricing and rate structure for entrance facilities.

B. The Pricing-Related Arguments of AT&T, Integra and the Payphone Associations Are Not Appropriate for Consideration in this Section 271 Proceeding.

Qwest demonstrated in its application that its existing rates for UNEs, interconnection, and reciprocal compensation comply with all applicable rules and policies, including the TELRIC pricing rules. No party submits any evidence refuting this showing. However, three parties – AT&T, Integra, and the Payphone Association – raise tangentially pricing-related arguments that the Commission has already held to be irrelevant to Section 271 proceedings.

AT&T raises – inappropriately, for the first time in this Section 271 proceeding – a complicated dispute relating to which rates – TELRIC reciprocal compensation rates or access charges – should apply to certain local “transit” traffic carried over commingled Feature Group D trunks, pursuant to a New Mexico interconnection agreement between AT&T and Qwest. *See* Thompson/Freeberg Reply Decl. ¶¶ 17-20. AT&T's arguments involve “a specific carrier-to-carrier dispute[]” on an issue “that our rules have not yet addressed and that do not involve *per se* violations of the Act or our rules” – and thus are not appropriately dealt with in the context of a section 271 proceeding.” ^{53/} Moreover, the dispute involves a *de minimis* amount of money and has absolutely no impact on competition. ^{54/}

^{53/} *Qwest 271 Order* ¶ 325 (citing *BellSouth Five-State 271 Order*, 17 FCC Rcd 17721-22, ¶ 227); *Pennsylvania 271 Order*, 16 FCC Rcd at 17470, ¶ 92; *Texas 271 Order*, 15 FCC Rcd at

Both Integra and the Payphone Association raise issues that the Commission held in the *Qwest 271 Order* could not be addressed in Section 271 proceedings. Integra complains that Qwest is proposing UNE rates significantly higher than the currently effective rates in a pending rate proceeding in Oregon – a proceeding that Qwest does not expect to be completed until mid- to late 2004. Integra Comments at 2-4; Thompson/Freeberg Reply Decl. ¶ 26. But the Commission has made it clear that “[t]he existence of a pending UNE rate investigation in [a state] does not lead us to conclude that Qwest’s current . . . rates [in that state] are impermissibly temporary. As we have noted previously, we perform our section 271 analysis on the rates before us. If we find these rates to be TELRIC-compliant, then Qwest has met its obligation to price UNEs in compliance with checklist item two.” *Qwest 271 Order* ¶ 307 (citing *Georgia/Louisiana 271 Order*, 17 FCC Rcd at 9066-67 ¶ 97 (citing *Rhode Island 271 Order*, 17 FCC Rcd at 3317 ¶ 31)). Similarly, as the Commission held in the *Qwest 271 Order*, the Payphone Association’s complaints about whether Qwest’s “payphone [access line] rates comply with our rules cannot, and should not, be decided in the context of this section 271 application.” 55/

18541, ¶ 383; *see also AT&T Corp. v. FCC*, 220 F.3d 607, 621-22, 630-32 (D.C. Cir. 2000). In the recent Verizon Virginia arbitration proceeding, the Bureau confirmed that “the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service [at TELRIC rates] under this provision of the statute, nor do we find clear Commission precedent or rules declaring such a duty.” *Petition of WorldCom, Inc. Regarding Interconnection Disputes with Verizon Virginia Inc.*, CC Docket No. 00-218, DA 02-1731, ¶ 117 (WCB rel. July 17, 2002).

54/ Although not relevant to the disposition of this proceeding, it should be noted that Qwest is prepared to resolve the matter amicably with AT&T. Thompson/Freeberg Reply Decl. at n.29.

55/ *Qwest 271 Order* ¶ 507. *See also* Thompson/Freeberg Reply Decl. ¶ 27. Notably, although this is not relevant to the disposition of this Section 271 application, on February 14, 2003, Qwest implemented significantly lower payphone access line rates in Oregon, pursuant to a stipulation negotiated with the Northwest Public Communications Council.

VI. NONE OF THE REMAINING OBJECTIONS RAISED BY COMMENTERS PROVIDES ANY BASIS FOR DENIAL OF QWEST'S APPLICATION

Various commenters raise miscellaneous other issues that they assert present grounds for denial of this application. Some of these matters already were addressed in the *Qwest 271 Order*. Others are pending in other fora and are not properly presented in the context of a Section 271 proceeding. None of them provide any basis for an adverse decision here.

A. Touch America Has No Foundation for Its Allegations that Qwest Will Not Comply with Section 272.

Only Touch America makes any substantial comment on Qwest's Section 272 showing, 56/ and its comments raise no significant issues that were not considered and rejected by the Commission in the *Qwest 271 Order*. The application, including the declarations of Marie E. Schwartz, Judith L. Brunsting, and Jerome R. Mueller, shows that QC, QLDC, and QCC have the necessary controls in place to ensure that they will provide in-region interLATA services in compliance with Section 272. QLDC is compliant with Section 272 today and is in fact providing service pursuant to Commission authority. QCC will not provide in-region interLATA services until the completion of QCII's financial restatement process, at which time it will be beyond dispute that it is maintaining its books, records, and accounts in accordance with generally accepted accounting principles ("GAAP").

Touch America does not challenge the fact that QLDC is operating in compliance with Section 272 today or that it will continue to do so upon grant of this application. Nor does Touch America challenge in any substantive way Qwest's showing that QCC will be in a position to provide service in compliance with Section 272 upon completion of the pending

56/ See 47 U.S.C. § 271(d)(3)(b) (providing that the Commission must find that "the requested authorization will be carried out in accordance with the requirements of section 272").

restatement process. At that time QCC will have made the accounting adjustments necessary to hold out its books, records and accounts for prior periods as compliant with GAAP. The application demonstrates that Qwest management is committed to GAAP compliance and that new controls are in place to assure compliance with Section 272 going forward. *See* Application at 158-59; Letter from Oren G. Shaffer to Marlene H. Dortch (August 26, 2002), Attachment 5, Appendix P, Volume 4c, Tab 1. Qwest management has shown its commitment to accurate bookkeeping and compliance with GAAP, and the enactment and implementation of the Sarbanes-Oxley Act of 2002 57/ provides this Commission added assurance that compliance with GAAP will be a top priority of QCII. 58/

In the face of this record, Touch America resorts only to rhetoric. It makes gross allegations challenging Qwest's accounting controls, simply ignoring all of the evidence that

57/ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (to be codified in scattered sections of 15 U.S.C., 18 U.S.C., and 28 U.S.C.).

58/ Among other things, this new statute requires any public company's chief executive officer and chief financial officer to certify, with respect to quarterly and annual reports filed after August 29, 2002, that to the officer's knowledge there are no material misstatements or omissions in the report and that the report fairly presents the company's financial condition, and to certify the quality of the company's internal controls and procedures that are intended to assure the quality of its financial reporting. *Id.* § 302; Certification of Disclosure in Companies' Quarterly and Annual Reports, 67 Fed. Reg. 57,276, 57,288 (to be codified at 17 C.F.R. § 240.13a-14). The Securities and Exchange Commission has stated that the certification that the report fairly presents the company's financial condition is not limited to, but is broader than, financial reporting requirements under generally accepted accounting principles. *See id.*, 67 Fed. Reg. at 57,279. A separate provision requires that each periodic report filed with the SEC be accompanied by a statement of the company's CEO and CFO that the report "fully complies" with the requirements of the Securities Exchange Act of 1934 and that the information in the report fairly presents, in all material respects, the company's financial condition and results of operations. *Id.* § 906 (to be codified at 18 U.S.C. § 1350(a)-(b)). This certification requirement is not limited to the officer's knowledge, and the "fully complies" statement is not limited to material compliance. The Act imposes criminal penalties if an officer knowingly or willfully makes a false certification. *Id.* § 906 (to be codified at 18 U.S.C. § 1350(c)). In light of the regulatory environment created by this statute and enforced by both the SEC and the Department of Justice, the FCC can be assured that Qwest's Section 272 affiliates will comply with GAAP.

Qwest, and its current management and new accountants, are committed to and have implemented appropriate controls and procedures. Similarly, Touch America alleges that Qwest's application somehow was not "complete when filed." Touch America Comments at 3. Qwest has presented complete information on QLDC in its application, and Touch America does not address it. Qwest also has provided complete information on QCC, making clear that QCC also will operate in compliance with Section 272 upon completion of the pending restatement process. Touch America does not show otherwise. This record is sufficient for the Commission to make the predictive judgment called for in Section 271(d)(3)(b).

For all of these reasons, the Commission should reject Touch America's unfounded attacks and find that Qwest will comply with Section 272 in its provision of in-region interLATA services.

B. The SDPUC Has Approved Qwest's QPAP and Recommended that Qwest's Application for interLATA Authority in South Dakota Be Granted

The SDPUC initially declined to accept certain features of Qwest's proposed South Dakota QPAP, including Qwest's proposed annual cap on its potential financial liability and limitations on the ability of the SDPUC to require that Qwest make future changes to the QPAP. *See* SDPUC Comments at 8-16. On February 17, 2003, Qwest filed with the SDPUC a revised QPAP that included some changes to which Qwest had agreed in correspondence with the SDPUC staff in late January 2003, and others that the SDPUC noted in its Comments in this proceeding would be "acceptable" in order to resolve the remaining open issues regarding the QPAP. *See* SDPUC Comments at 11, 14, 16. ^{59/} In addition, Qwest asked the SDPUC to accept

^{59/} The SDPUC stated in its Comments that, "upon the making of [the QPAP changes specified in the Comments], the [SDPUC] would then recommend to the FCC that it would be in the public interest to grant Qwest section 271 approval." *Id.* at 16.

the following provision in the six-month review section of the South Dakota QPAP, which is also included in other approved Qwest PAPs. The provision states:

16.1.2 Nothing in this PAP precludes the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this PAP, including any modifications resulting from the process described in Section 16.0.

On February 20, 2003, the SDPUC voted to accept the revised QPAP, including the additional language, and to recommend that the FCC approve Qwest's application for Section 271 authority for the State of South Dakota. The SDPUC's decision was embodied in its *Order Regarding Public Interest Compliance Filing and Final Recommendation to the FCC*, TC01-165 (SDPUC Feb. 26, 2003), in which it concluded that "Qwest's entry into the interLATA market in South Dakota is in the public interest" and recommended that the FCC grant Qwest's application.

C. The FCC and NMPRC Already Have Rejected AT&T's Argument that "Unfiled Agreements" Matters in New Mexico Prevent a Public Interest Finding Here

AT&T once again argues that issues related to Qwest's past interpretation of Section 252 provide a basis for denying the company authority under Section 271 here. AT&T begrudgingly admits that the Commission already has rejected similar argumentation in the *Qwest 271 Order*. AT&T Comments at 31-32. Nevertheless, AT&T distorts the findings of the NMPRC in an attempt to argue that New Mexico is a different case. According to AT&T, the so-called "unfiled agreements" record in New Mexico presents a basis for finding that the public interest would not be served by granting 271 authority to Qwest here. *Id.* at 30-35. *See Qwest 271 Order* ¶¶ 466-91.

First of all, AT&T deliberately ignores the NMPRC's conclusion rejecting this very same argument based on that commission's own investigation. The NMPRC stated that it was "not persuaded that the unfiled agreements in issue have had the effect of significantly frustrating Congress' intent that local markets be open to competition." 60/ The NMPRC expressly concluded that the unfiled agreements matter does not provide a basis for rejecting 271 authority under the public interest standard. The NMPRC noted the remedial actions that Qwest had taken earlier in 2002, and concluded that these policies should prevent further compliance issues from arising in this area. *Id.* at paras. 302-04.

In its comments to the Commission here, the NMPRC has reaffirmed that the "unfired agreements" issue does not provide a basis for challenging this application on public interest grounds:

Having reviewed the Commission's *Qwest 271 Order*, the NMPRC reports to the Commission that it stands squarely behind its recommendation that the Commission find that the local exchange market in Qwest's New Mexico territory is open to competition and there are no unusual circumstances that would make long distance entry contrary to the public interest under the particular circumstances of Qwest's section 271 application for New Mexico. [NMPRC Comments at 60 & n.223 (referencing, *inter alia*, "NMPRC findings and conclusions regarding its unfired interconnection agreements investigation in Utility Case No. 3750") (citation omitted).]

This is correct. As Qwest discussed in its application, the company has policies in place that are ensuring full compliance with Section 252 with respect to all new contracts with CLECs. Qwest

60/ NMPRC *Final Order Regarding Compliance with the Remaining Aspects of Section 271* ¶ 302 (Oct. 8, 2002) ("*NMPRC Final Order*"). It is disingenuous of AT&T to cite to other aspects of the *NMPRC Final Order* without noting the commission's ultimate conclusion.

also has submitted for state commission review all previously unfiled contracts with CLECs containing current, ongoing obligations related to Sections 251(b) or (c). 61/

AT&T presents two arguments in its comments. First, AT&T speculates that additional agreements “may exist” that should be filed with the NMPRC. AT&T Comments at 31. However, AT&T fails to point to any such agreements, and Qwest has made clear that none exist. 62/

Second, AT&T claims that the Commission has made findings of intentional past discrimination that justify rejection of this application. *Id.* at 35. However, as noted above, the NMPRC in fact concluded - and has now reaffirmed in its comments - that its unfiled agreements record *does not* provide a public interest basis for denying Qwest Section 271 authority. Indeed, the NMPRC record underscores why the “unfiled agreements” matter should not be litigated in a Section 271 case. To begin with, the NMPRC has expressly contemplated further proceedings regarding the matter of any past non-compliance. *NMPRC Final Order* ¶ 302. This is consistent with the Commission’s view that such enforcement proceedings are not a matter for consideration in a Section 271 case. *Qwest 271 Order* ¶ 466.

61/ Qwest Br. at 174-76. The previously-unfiled agreements were submitted in September 2002 and addressed by the relevant state commissions, including the NMPRC, in decisions issued in November and December. In addition, in January 2003 Qwest filed for state commission approval of various form contracts for standard product offerings which are and have been generally available to all CLECs. As Qwest explains in the application, it believes that these agreements are order form contracts exempt from Section 252. However, Qwest has no objection to filing them, and has done so given a question that arose in the *Qwest 271 Order* regarding the scope of the contract order form exception to Section 252. See Qwest Br. at 175-76.

62/ Nor has the NMPRC made any different finding. AT&T points to speculative language by the PRC in its order, based on issues that arose in the discovery process. However, the PRC has no basis for concern in this area, and Qwest reasserts that it has filed all contracts with New Mexico CLECs that require PRC approval under Section 252.

Furthermore, the record before the NMPRC itself demonstrates the legal confusion surrounding the interpretation of Section 252 prior to (and even after) the Commission's Declaratory Ruling on the subject, a matter directly relevant to a party's good faith. 63/ The Declaratory Ruling was issued just two business days before the NMPRC's order. Perhaps understandably given the short interval, the latter is inconsistent with the Declaratory Ruling in important respects. For example, the NMPRC claims jurisdiction to approve backwards-looking dispute settlements that the Ruling excludes from Section 252. *NMPRC Final Order* ¶ 281. The NMPRC also claims the right to approve agreements with CLECs operating in other states but not in New Mexico. *Id.* ¶ 282. Qwest has filed for rehearing of the NMPRC ruling on these two issues, 64/ and the Commission does not need to address the contours of Section 252 here. For present purposes, these residual issues before the NMPRC only serve to further demonstrate the confusion regarding Section 252 in the past, and the reason why any past compliance matters do not justify an adverse public interest finding in a Section 271 application proceeding. The Commission reached this conclusion in the Qwest III proceeding, 65/ and it should do the same here.

AT&T also briefly references a potpourri of other arguments it made in the context of the Qwest III application, arguments that the Commission did not accept then and

63/ *Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, FCC 02-276 (Oct. 4, 2002).

64/ *See* Qwest Corporation's Motion For Rehearing Of The Final Order Limited To The Requirements To File Historical Settlement Agreements And Extraterritorial Agreements And Motion For Stay Of Those Requirements, Utility Case No. 3269 (filed Nov. 7, 2002).

65/ *See also* *Qwest 271 Order* ¶ 499 ("Qwest responded to criticism in the Qwest I and Qwest II record by taking positive action to file agreements at a time when there was no Commission guidance on the definition of the statutory term 'interconnection agreement.'")

need not address now. *Qwest 271 Order* ¶¶ 501-03. For all of AT&T's rhetoric, the bottom line is that Qwest's local markets are open in the states of New Mexico, Oregon and South Dakota. It follows that the public interest clearly is served by the new interexchange competition that Qwest will bring to consumers in those states.

D. The City of Portland's Allegations Regarding Access to UNEs Already Are Being Considered in an Appropriate Forum and Are Not Material to this Commission's Consideration of Qwest's Section 271 Application

In its comments, the City of Portland, Oregon ("City of Portland" or "City") asks the Commission to reject Qwest's application for long distance authority in Oregon because Qwest allegedly is failing to honor the City's interconnection agreement. City of Portland Comments at 7-8. This is exactly the kind of interconnection dispute that the Commission has ruled does not belong in a Section 271 application proceeding. *See, e.g., Qwest 271 Order* ¶ 325 (citing *BellSouth Five-State 271 Order*, 17 FCC Rcd 17721-22, ¶ 227).

As background, Qwest is not refusing to honor the agreement; rather, the agreement is the subject of a pending arbitration proceeding in Oregon. The key issue in this arbitration is the understanding of the parties when they executed the interconnection agreement. Qwest believes the City's claims are unfounded, but in any event the arbitration is the proper place for the dispute to be resolved, not here.

The City also criticizes Qwest for citing to its interconnection agreement with the City "in support of its application" and alleges that by doing so, Qwest "has misled the Commission." *Id.* at 5. This criticism is misguided. In the first place, Qwest does not rely on the City's interconnection agreement to support its application; Qwest has executed more than enough interconnection agreements in Oregon to satisfy Track A and, contrary to the City's allegation, does not refer to the City's interconnection agreement to demonstrate its compliance

with Checklist Item 1. 66/ Furthermore, Qwest has made a concerted effort in its application to provide the Commission with a complete listing of its filed interconnection agreements in each state. Although the City criticizes Qwest for including an agreement that is the subject of pending arbitration proceedings, Qwest believes that the Commission benefits from seeing all of the agreements that the OPUC has approved. 67/

In short, the City's interconnection dispute is being addressed in the proper forum and is not properly considered in a 271 proceeding, especially when the City's complaints could have been but were not raised in the Oregon proceedings.

CONCLUSION

The local exchange market in each of the application states is demonstrably open to competition. Qwest has satisfied its statutory checklist obligations and otherwise complied with the requirements of the 1996 Act, and it will continue to do so in the future. Its entry into the interLATA market in each of New Mexico, Oregon and South Dakota will fulfill the promise of competition for all the residents of these states.

66/ Qwest's application does note that Qwest is providing the City with collocation under its interconnection agreement, but the City's comments do not allege that Qwest is failing to offer collocation.

67/ Presumably the City also would have complained had Qwest omitted listing its interconnection agreement in the application.

Accordingly, for all the reasons stated herein and in its opening brief, Qwest's Consolidated Application should be granted.

Respectfully submitted,

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